

5-1-1986

Congress Responds to Sedima: Is There a Contract Out on Civil RICO

Bruce Haber

Recommended Citation

Bruce Haber, *Congress Responds to Sedima: Is There a Contract Out on Civil RICO*, 19 Loy. L.A. L. Rev. 851 (1986).
Available at: <https://digitalcommons.lmu.edu/llr/vol19/iss3/7>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

CONGRESS RESPONDS TO *SEDIMA*: IS THERE A CONTRACT OUT ON CIVIL RICO?

I. INTRODUCTION

In September, 1985, in the Boston trial of reputed crime boss Genaro J. Anguilo, the prosecution introduced a tape recording of a telephone conversation between Anguilo and a lieutenant in his organization, a Mr. Zannino. The two men discussed their understanding that, under federal court decisions, the Racketeer Influenced and Corrupt Organizations Act (RICO)¹ applied only to the racketeering activity of a legitimate business, and not an illegitimate one:

Anguilo: Our argument is we're illegitimate business.

Zannino: We're a shylock.

A: We are a bookmaker. We're selling marijuana. We are illegal here, illegal there. Arsonists. We are everything.

Z: Pimps.

A: So what?

Z: Prostitutes.

A: The law does not cover us, is that right?

Z: That is the argument.

A: I wouldn't be in a legitimate business for all the money in the world!²

Of course, Mr. Anguilo is no more exempt from the provisions of the anti-racketeering statute than he would be if he were in a legitimate business.³ But the problem as many see it, at least with respect to the private civil action authorized by RICO under 18 U.S.C. § 1964(c),⁴ is that it is used almost exclusively against "the legitimate businesses it was intended to protect."⁵ Instead of a weapon against "racketeering," as

1. 18 U.S.C. §§ 1961-1968 (1982), 18 U.S.C.A. §§ 1961(1), 1963, 1964(b) (West Supp. 1985).

2. N.Y. Times, Sept. 8, 1985, § 1, at 26, col. 1.

3. Had Mr. Anguilo read *United States v. Turkette*, 452 U.S. 576 (1981), he would have known that RICO applies "to both illegitimate and legitimate enterprises." *Id.* at 585.

4. 18 U.S.C. § 1964(c) (1984). For complete text, see *infra* Appendix A.

5. *Hearings on RICO Before the Subcomm. on Oversight of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (Sept. 24, 1985) (statement of David Albenda, on behalf of American Council of Life Insurance) (official government printing not yet available; cited from text of prepared statement, at 1). In 1969, Senator Roman L. Hruska, co-sponsor of S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6995-96 (1969) (predecessor to S. 30, 91st Cong., 2d Sess., 116 CONG. REC. 575-85 (1970)), Title IX of which became RICO, said that:

[S. 1623] also creates civil remedies for the honest businessman who has been dam-

that term is generally understood, RICO's treble damage remedy,⁶ it is said, has been used as a means to extort unwarranted settlements in cases of "garden variety fraud" and "ordinary commercial disputes."⁷

The Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*,⁸ afforded no relief. Adopting a literal reading of RICO, the Court endorsed the expansive application of RICO that gave rise to the current controversy. In essence, the Court returned the statute for "correction" to Congress, where the trouble originated.⁹

Now Congress is taking a second look at RICO. This Comment, after briefly reviewing the civil RICO controversy, will examine the major proposals that Congress is now considering. Part II sets forth the portions of the statute that are relevant to the private civil remedy. Part III shows how the remedy has been used and reviews judicial interpretation of the statute through the *Sedima* decision. Part IV identifies the principal arguments for limiting the scope of section 1964(c), primarily as they have been presented to Congress in recent Senate and House hearings and the response to those arguments. Part V sets forth the three congressional bills that have been introduced on the subject and discusses the principal issues that have emerged from the congressional hearings on the bills. In conclusion, Part VI reiterates this Comment's agreement with those commentators who believe that section 1964(c) should be pre-

aged by unfair competition from the racketeer businessman. Despite the willingness of the courts to apply the Sherman Antitrust Act to organized crime activities, as a practical matter the legitimate businessman does not have adequate civil remedies available under the Act. This bill fills that gap.

115 CONG. REC. § 6993 (1969). Senator Hruska appeared before the 99th Congress in 1985 to testify that:

[S]peaking for myself, it was not my intention that the civil sanctions contained in Title IX serve as a vehicle to engage in the type and extent of use to which many efforts are directed. My bills, and their successors, were directed at organized crime. They were not intended to be a vehicle to charge legitimate businessmen with organized crime activities.

Hearings on RICO Before the Subcomm. on Oversight of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (May 20, 1985) (statement of former Sen. Roman L. Hruska) (official government printing not yet available; cited from text of prepared statement, at 8). See also Justice Marshall's combined dissent in *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3292 (1985) (Marshall, J., dissenting in *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 and *American Nat'l Bank & Trust Co. v. Haroco, Inc.*, 106 S. Ct. 3291). "To allow punitive actions and significant damages for injury beyond that which the statute was intended to target is to achieve nothing the statute sought to achieve, and ironically to injure many of those lawful businesses that the statute sought to protect." *Id.* at 3302 (Marshall, J., dissenting).

For further discussion of the disagreement on Congress' intent for the scope of RICO, see *infra* note 20.

6. 18 U.S.C. § 1964(c) (1982); see *infra* Appendix A for full text of § 1964(a).

7. See *infra* text accompanying notes 87-92.

8. 105 S. Ct. 3275 (1985).

9. See *infra* text accompanying notes 81-82.

served with, at most, minor modifications, directed particularly at clarifying the definition of "pattern" and limiting vicarious liability for treble damages.

II. THE PRIVATE CIVIL REMEDY: SECTION 1964(c)

RICO encompasses 18 U.S.C. §§ 1961-1968 and includes both criminal and civil provisions.¹⁰ Section 1964(c) provides the treble damages and attorneys' fees in federal court for "any person injured in his business or property by reason of a violation of section 1962."¹¹ Section 1962 prohibits "any person" from conducting or acquiring an interest in an "enterprise"¹² engaged in interstate commerce through "a pattern of racketeering activity" or collection of an unlawful debt, from using funds obtained through a pattern of racketeering activity or collection of an unlawful debt to acquire such an interest, or from conspiring to engage in the prohibited conduct.¹³ Section 1961(1) defines "racketeering activity" as any "chargeable" or "indictable" act enumerated in a list of violations of state and federal law, including—the most controversial—mail fraud, wire fraud and fraud in the sale of securities.¹⁴ A "pattern of racketeering activity" requires the commission of at least two such acts within ten years.¹⁵ Judge Posner noted that, "[t]he statute is constructed on the model of a treasure hunt."¹⁶

RICO was originally conceived as a weapon against infiltration of organized crime into the legitimate business community.¹⁷ One of RICO's sponsors described section 1964(c) as "a major new tool in extir-

10. 18 U.S.C. §§ 1961-1968 (1982), 18 U.S.C.A. §§ 1961(1), 1963, 1964(b) (West Supp. 1985). Section 1963 provides for criminal penalties including imprisonment, fines and forfeiture of property. Section 1964 provides the civil remedies. Injunctions are provided for in § 1964(a), but the general view is that they are made available only to the federal government. See ABA SECTION OF CORP., BANKING AND BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 321-42 (1985) [hereinafter cited as ABA TASK FORCE REPORT]. For the text of provisions relevant to the private civil remedy provided by § 1964(c), see *infra* Appendix A.

11. 18 U.S.C. § 1964(c) (1982); for complete text, see *infra* Appendix A. *Id.*

12. For text of 18 U.S.C. § 1961(3) & (4) (1982), definitions of "person" and "enterprise," see *infra* Appendix A.

13. 18 U.S.C. § 1962 (1982); for complete text, see *infra* Appendix A.

14. 18 U.S.C.A. 1961(1) (West Supp. 1985). For complete text, see *infra* Appendix A. For texts of 18 U.S.C. § 1341 (1982) (mail fraud) and 18 U.S.C. § 1343 (1982) (wire fraud) and a discussion of the controversy surrounding these frauds as predicate offenses, see *infra* note 258 and accompanying text.

15. 18 U.S.C. § 1961(5) (1982); for complete text, see *infra* Appendix A. For a discussion of the "pattern" requirement, see *infra* notes 219-57 and accompanying text.

16. *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 652 (7th Cir. 1984).

17. See *supra* note 5.

pating the baneful influence of organized crime in our economic life."¹⁸ In addition to providing innocent victims of racketeers a valuable remedy, a chief feature of the provision is what has become known as its "private attorney general" effect, whereby the prospect of treble damages and attorneys' fees would encourage victims to invoke the statute, deterring the proscribed conduct by at once making that conduct unprofitable and rendering its consequences more certain.¹⁹

III. THE GATHERING STORM

A. *How Section 1964(c) Has Been Used*

Subsequent uncertainties concerning RICO's scope derive in part from the fact that, while all the statements of the enacting Ninety-first Congress suggested that the statute is directed against organized crime, organized crime is nowhere mentioned in the statute. Rather, Congress chose to define RICO's objectives in terms of conduct designated as "racketeering activity."²⁰ But the meaning given that term by the statute

18. 116 CONG. REC. 25,190 (1970) (statement of Sen. McClellan).

19. See *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3284 (1985) ("Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps.").

20. RICO was enacted as Title IX of the Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941-48 (codified as amended at 18 U.S.C. §§ 1961-1968 (1982), 18 U.S.C.A. §§ 1961(1), 1963, 1964(b) (West Supp. 1985)), as Congress' response to the growing influence of organized crime disclosed 19 years earlier by the Special Committee to Investigate Organized Crime in Interstate Commerce (the Kefauver Committee). Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennet v. Berg*, 58 NOTRE DAME L. REV. 237, 249 (1982). The announced purpose of the Act was "to seek the eradication of organized crime in the United States." Organized Crime Control Act of 1980, Pub. L. No. 91-452, 84 Stat. 992, 923 (Statement of Findings and Purposes). Title IX was specifically directed at "the infiltration of organized crime into legitimate business." S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1969).

On the question of why Congress wrote the statute without reference to organized crime, some commentators have focused on Congress' wish to avoid possible constitutional problems attendant upon creating a crime of status, as distinguished from a crime of conduct. See ABA TASK FORCE REPORT, *supra* note 10, at 90-91, citing remarks of Representative Poff, the bill's primary supporter in the House of Representatives: "'S. 30 is objectionable on civil liberties grounds, it is suggested, because its provisions have an incidental reach beyond organized crime. . . . Have they forgotten that the Constitution applies to those engaged in organized crime just as it applies to those engaged in white-collar or street crime?'" *Id.* at 91 n.114 (quoting 116 CONG. REC. 18,913-14 (1970) (statement of Rep. Poff)).

Professor G. Robert Blakey, who was Chief Counsel for the Senate Subcommittee on Criminal Laws and Procedures when the OCCA was processed, insists that "Congress fully intended, after specific debate, to have RICO apply *beyond* any limiting concept like 'organized crime' or 'racketeering.'" Blakey, *supra*, at 280 (emphasis in original). See also the remarks of the other co-sponsor of S. 30, Senator McClellan:

[T]he curious objection has been raised to S. 30 as a whole, and to several of its provisions in particular, that they are not somehow limited to organized crime itself . . . as if organized crime were a precise and operative legal concept, like murder,

does not confine itself to Congress' stated objectives. Since RICO was enacted in 1970, virtually all the private civil RICO litigation under 18 U.S.C. § 1964(c)²¹ has involved defendants with no known connection to organized crime, yet pulled within the scope of the statute by allegations of fraud in their business transactions.

A Department of Justice survey of 230 cases brought under section 1964(c) reveals that only about seven percent of those actions involved organized crime or allegations of violent offenses or other offenses normally associated with organized crime, such as organized theft, bribery and public corruption.²² About two-thirds of these cases were predicated

rape, or robbery. Actually, of course, it is a functional concept like white collar crime, serving simply as a shorthand method of referring to a large and varying group of criminal offenses committed in diverse circumstances. The danger posed by organized crime-type offenses to our society has, of course, provided the occasion for examination of the working of our system of criminal justice. But should it follow . . . that any proposals for action stemming from that examination be limited to organized crime?

116 CONG. REC. 18,913 (1970) (statement of Sen. McClellan). For a thorough review of RICO's legislative history, see Blakey, *supra*, at 249-80.

Organized crime may not be as impossible of definition as represented in early RICO debates. A definition of "criminal syndicate" appears in H.R. 2517, 99th Cong., 1st Sess. (1985) (available on United States Depository microfiche); see *infra* note 152 for complete text of H.R. 2517. H.R. 2517 would add a provision to RICO making it unlawful to "participate in a supervisory capacity in a criminal syndicate." H.R. 2517, § 2(1)(a).

Several state statutes modeled on RICO already have similar provisions. See ARIZ. REV. STAT. ANN. § 13-2301(C)(2) ("criminal syndicate" defined), § 13-2308 (leading organized crime); HAWAII REV. STAT. § 842-1, -6 (Supp. 1982) (enjoining other business operations of persons engaged in "organized crime"); NEV. REV. STAT. § 207.370 (1983) ("Criminal syndicate" defined); N.D. CENT. CODE Ch. 12.1-06.1 to -02.1 (Supp. 1983) (leading organized crime); WASH. REV. CODE ANN. § 9A.82.060 (Supp. 1984) (leading organized crime). California defines "organized crime" as:

crime which is of a conspiratorial and (1) organized nature and which seeks to supply illegal goods and services such as narcotics, prostitution, loan sharking, * * * gambling, and pornography or, (2) through planning and coordination of individual efforts, to conduct the illegal activities of arson for profit, hijacking, insurance fraud, smuggling, operating vehicle theft rings, or systematically encumbering the assets of a business for the purpose of defrauding creditors.

CAL. PENAL CODE § 186.2(d) (West Supp. 1985) (asterisks in original, indicating deletion by amendment; italics in original, indicating additions by amendment).

In 1970, while the House was considering OCCA, Representative Biaggi offered and quickly withdrew an amendment that would have prohibited membership in the Mafia or La Cosa Nostra. 116 CONG. REC. 35,342-43 (1970). The amendment defined the Mafia and La Cosa Nostra as "nationally organized criminal groups composed of persons of Italian ancestry forming an underworld government ruled by a form of board of directors, who direct or conduct a pattern of racketeering activity and control the national operation of a criminal enterprise in furtherance of a monopolistic trade restraining criminal conspiracy." *Id.*

For views that RICO was intended to protect legitimate business from organized crime, see *supra* note 5.

21. 18 U.S.C. § 1964(c) (1982).

22. *Hearings on RICO Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (Sept. 18, 1985) (statement of John C. Keeney, Deputy

on fraud,²³ lending statistical support to the contention that inclusion of the commercial fraud offenses in section 1961 is a chief cause of the complained of overbreadth of civil RICO. Not surprisingly, other surveys have produced similar results.²⁴

The American Bar Association Section on Corporation, Banking and Business Law, Civil RICO Task Force (ABA Task Force) reported that their computer database²⁵ "contains at least 40 cases in which bro-

Assistant Att'y Gen., Criminal Div., appearing on behalf of the Dep't of Justice) (official government printing not yet available; cited from text of prepared statement, at 23-24) [hereinafter cited as J. Keeney, *Hearings on RICO*].

23. *Id.*

24. The ABA Section on Corporation, Banking and Business Law, Civil RICO Task Force (ABA Task Force) surveyed approximately 270 reported civil RICO cases as of March, 1985. According to the survey:

Forty percent of the cases involve allegations of securities fraud, and another 37 percent allege common law fraud in a commercial or business setting. The remaining cases involve a variety of matters, including anti-trust or unfair competition (4 percent), bribery or commercial bribery (4 percent), fraud not related to securities or business transactions (3 percent), labor-related matters (2 percent), theft or conversion (1 percent), and a range of other allegations. Approximately nine percent of the cases involve allegations of criminal activity of a type generally associated with professional criminals (arson, bribery, commercial bribery, embezzlement, extortion, gambling, theft, political corruption).

ABA TASK FORCE REPORT, *supra* note 10, at 55-56 (1985).

The American Institute of Certified Public Accountants (AICPA) surveyed 132 civil RICO decisions, breaking the actions down into the following categories:

Securities transactions	57	[43%]
Commercial and contract disputes	38	[29%]
Commodities trading	6	[5%]
Bank loans	6	[5%]
Antitrust price fixing	3	[2%]
Religious disputes	2	[1.5%]
Divorce	1	[1%]
Union affairs	3	[2%]
Commercial bribery/kickbacks	2	[1.5%]
Political corruption (including official extortion and bribery)	9	[7%]
Theft (by cleaners from apartment dwellers)	1	[1%]
Violent crimes (murder, arson, extortion)	3	[2%]
	[131]	[100%]

American Institute of Certified Public Accountants, *The Authority to Bring Private Treble-Damage Suits Under "RICO" Should Be Reformed* 13 (Oct. 10, 1984) (manuscript) [hereinafter cited as AICPA *White Paper*], reprinted in ABA SECTION OF CORP., BANKING AND BUSINESS LAW, PROGRAM: TASK FORCE ON CIVIL RICO § D (1985) (compilation of documents to supplement a seminar on civil RICO). Apparently, one case did not fit into any category. The report concludes that "cases that could fairly be characterized as having anything to do with aiding the war on organized crime are a tiny minority." *Id.*

25. See *supra* note 24 for a percentage breakdown of the categories of actions brought under RICO as of March, 1985.

ker-dealers were the primary defendant, 32 cases in which banks were the primary defendant, and over 20 cases in which lawyers or accountants were defendants.”²⁶ These figures may not demonstrate, as the Task Force believes they do, “that legitimate businesses, as well as their professional advisers, are the principal victims of such broad use of the statute.”²⁷ They do seem to indicate, however, that section 1964(c) has embraced many defendants who are not the sort contemplated by the enacting Congress.²⁸

The most frequently cited examples of non-criminal uses of RICO are cases brought against securities brokers, banks, insurers and public accounting firms. Securities firms are sued under section 1964(c) for “churning,” a practice in which brokers engage in excessive trading disregarding the client’s investment objectives in order to generate commissions.²⁹ Banks are brought under RICO in so-called “prime-rate

26. ABA TASK FORCE REPORT, *supra* note 10, at 35.

27. *Id.*

28. See *supra* note 5. A partial list of defendants named in § 1964(c) suits includes: Aetna Casualty & Surety Co.; A.H. Robins Company, Inc.; Alexander Grant & Co.; Allstate Insurance Co.; American Broadcasting Co.; Arthur Andersen & Co.; Bache Halsey Stuart Shields; Bear Stearns & Co.; Chase Manhattan Bank; Citibank, N.A.; Coopers & Lybrand; Dean Witter Reynolds; Drexel Burnham Lambert, Inc.; E.F. Hutton & Co.; Exxon Corp.; Ford Motor Co.; General Motors Corp.; Lehman Bros.; Merrill Lynch, Pierce, Fenner & Smith; Miller Brewing Co.; Morgan Stanley & Co.; Paine, Webber, Jackson & Curtis, Inc.; Pantry Pride, Inc.; Price Waterhouse & Co.; Prudential Bache Securities, Inc.; Prudential Life Insurance Co.; Rockwell International Corp.; Shearson/American Express, Inc.; State Farm Fire & Casualty Insurance Co.; State Farm Mutual Automobile Insurance Co.; Touche Ross & Co.; Underwriters at Lloyds, London. See AICPA *White Paper*, *supra* note 24, at 16; Milner, *A Civil RICO Bibliography*, 21 CAL. W.L. REV. 409 (1985). While the preceding roster is neither representative of even a majority of § 1964(c) defendants, nor necessarily evidence of abuse, it serves to illustrate a source of concern to those who believe that civil RICO has become subject to uses contrary to the intent of the enacting Congress.

29. See, e.g., *Yancoski v. E.F. Hutton & Co.*, 581 F. Supp. 88 (E.D. Pa. 1983). In *Yancoski*, plaintiff Lorraine Yancoski sought “prudent and safe” investments for a large sum of money she had received in satisfaction of a judgment based on her husband’s death. She had not previously traded in securities. Herbert Krakovitz, a broker with E.F. Hutton, told the plaintiff he could invest her money safely so that it would produce income and capital growth. Based on Krakovitz’s statements, plaintiff placed \$100,000, the bulk of her assets, in a discretionary account at E.F. Hutton, with Krakovitz as account broker. *Id.* at 90. Krakovitz immediately began purchasing highly speculative stocks for the account, representing to plaintiff that these were cautious and safe investments. He engaged in heavy trading, which, during one two-month period, nearly equaled the entire value of the account. Krakovitz next persuaded plaintiff to purchase securities on margin, misrepresenting the risks of a margin account and its suitability to her investment objectives. Krakovitz continued to engage in heavy trading through which most of the plaintiff’s assets were lost while payments for commissions and interest on indebtedness to E.F. Hutton grew. *Id.*

The plaintiff closed her account and sued, seeking, among other things, treble damages and attorney fees under § 1964(c) predicated on violations of § 1962(c). The court dismissed the § 1964(c) count as to E.F. Hutton. The court reasoned that § 1964(c) prohibits a “person”

cases"—where allegations of fraud arise from the practice of making loans with a variable interest rate tied to a "prime rate" that is not, in fact, the bank's lowest lending rate.³⁰ Insurers that fail to pay claims are charged with fraudulently entering into insurance contracts with no in-

from conducting the affairs of an "enterprise" through a pattern of racketeering activity. While E.F. Hutton could be either the "person" or the "enterprise," it could not be both at the same time. In this case, E.F. Hutton was the enterprise, and could not be liable in a claim based on § 1962(c). *Id.* at 97. See *infra* note 47 for a discussion of the inability of a single entity to qualify for both the "enterprise" and "person" requirements at the same time.

For more examples of RICO-associated churning, see *Binkley v. Shaeffer*, 609 F. Supp. 601 (E.D. Pa. 1985); *Lopez v. Dean Witter Reynolds, Inc.*, 591 F. Supp. 581 (N.D. Cal. 1984); *Roche v. E.F. Hutton & Co.*, 603 F. Supp. 1411 (M.D. Pa. 1984); *In re Catanella & E.F. Hutton & Co., Sec. Litigation*, 583 F. Supp. 1388 (E.D. Pa. 1984); *Dakis v. Chapman*, 574 F. Supp. 757 (N.D. Cal. 1983); *Mauriber v. Shearson/American Express, Inc.*, 546 F. Supp. 391 (S.D.N.Y. 1982), *later proceeding*, 567 F. Supp. 1231 (S.D.N.Y. 1983); *Noland v. Gurley*, 566 F. Supp. 210 (D.C. Colo. 1983); *The Trane Co. v. O'Connor Sec.*, 561 F. Supp. 301 (S.D.N.Y. 1983); *Harper v. New Japan Sec. Int'l, Inc.*, 545 F. Supp. 1002 (C.D. Cal. 1982); *Landmark Savings & Loan v. Rhoades*, 527 F. Supp. 206 (E.D. Mich. 1981).

30. See, e.g., *Kleiner v. First Nat'l Bank of Atlanta*, 526 F. Supp. 1019 (N.D. Ga. 1981). In *Kleiner*, plaintiff executed notes to the defendant in the amount of \$100,000 or more calling for interest at one percent above the prime rate. The prime rate was defined in the note to be "the rate available to the Bank's most credit-worthy commercial borrowers." *Id.* at 1020-21. Defendant mailed plaintiff periodic statements reflecting the interest rate of one percent above defendant's published prime rate. *Id.*

Plaintiff learned, however, that many of defendant's commercial customers were charged interest rates substantially lower than the published prime rate. Plaintiff contended that the published prime rate was not equal to the interest rate paid by the defendant's most credit-worthy customers, as defendant had represented, and that the statements sent by the bank fraudulently overstated the interest charges. *Id.* at 1021.

Plaintiff's § 1964(c) cause of action was based on the predicate offense of mail fraud. The court dismissed the claim on the grounds "that the practice Plaintiff complains of has not traditionally been treated as criminal in nature." *Id.* at 1022.

But see *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 557 F. Supp. 111 (N.D. Ill. 1983), 747 F.2d 384 (3d Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985). The Supreme Court in *Haroco*, companion to *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985), affirmed the court of appeals' decision that recognized as fraud the practice of "publishing" a prime rate that was not the prime rate. *Haroco*, 105 S. Ct. at 3292.

The American Bankers Association does not view such cases as involving fraud at all:

Setting the prime rate, and even defining what the term means in a modern economy, is an extraordinary complicated thing—far more so than the "prime rate" plaintiffs make it out to be. I will not go into the details of why this is so, because that is not the issue before Congress today. Suffice it to say that the banking industry believes that there is no fraud inherent in tying an interest rate to some sort of a benchmark figure—whether it is called a "prime rate" or something else.

Hearings on RICO Before the Subcomm. on Oversight of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (July 31, 1985) (statement of Robert J. Hodges, appearing on behalf of The American Bankers Ass'n) (official government printing not yet available; cited from text of prepared statement, at 3).

The practice appears to be a common one. See, e.g., *Warren v. Manufacturer's Nat'l Bank*, 759 F.2d 542 (6th Cir. 1985); *Chemical Bank v. Geller*, 727 F.2d 61 (2d Cir. 1984); *Kredietbank, N.V. v. Joyce Morris, Inc.*, No. 84-1903 (D.N.J. Oct. 11, 1985) (available Jan. 14, 1986, on LEXIS, Genfed Library, Dist file); *Nordic Bank PLC v. Trend Group, Ltd.*, 619

tent to honor them.³¹ And public accounting firms that prepare inaccurate financial statements are accused of fraud.³² In each of these situations, two false statements by mail or phone may be sufficient to constitute a "pattern of racketeering activity."³³

B. Limiting Civil RICO

Of the nearly three hundred 18 U.S.C. § 1964(c)³⁴ suits surveyed by the ABA Task Force, as of March, 1985, only nine had resulted in treble damage awards.³⁵ Of the rest, the majority were dismissed.³⁶

Some district courts, relying on congressional legislative history on the enactment of RICO, held that a RICO claim was deficient for failure to allege a connection, or "nexus," between the defendant and organized crime.³⁷ In *Moss v. Morgan Stanley, Inc.*,³⁸ for example, the district court stated that Congress' inability to define "organized crime" left to the judiciary the case-by-case task of "limiting RICO to its intended scope and filtering out many RICO claims that are just efforts to claim

F. Supp. 542 (S.D.N.Y. 1985); *Wilcox Dev. Co. v. First Interstate Bank, N.A.*, 590 F. Supp. 445 (D. Or. 1984), *later proceeding*, 605 F. Supp. 592 (1985).

31. See *infra* note 93 and accompanying text.

32. See, e.g., *County of Cook v. Midcon Corp.*, 574 F. Supp. 902 (N.D. Ill. 1983), *aff'd*, 773 F.2d 892 (7th Cir. 1985) (Arthur Andersen); *Equitable Life Assurance Soc'y v. Alexander Grant & Co.*, No. 85 Civ. 3595 (S.D.N.Y. Dec. 23, 1985) (available Jan. 14, 1986, on LEXIS, Genfed library, Dist file); *Onesti v. Thomson McKinnon Sec., Inc.*, 619 F. Supp. 1262 (N.D. Ill. 1985) (Touche Ross); *Rand v. Anaconda-Ericsson, Inc.*, 623 F. Supp. 176 (E.D.N.Y. 1985) (Price Waterhouse); *Ahern v. Gaussion*, 611 F. Supp. 1465 (D. Or. 1985) (Touche Ross); *Bank of America Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 603 F. Supp. 351 (N.D. Ga. 1985).

33. For a discussion of the "pattern of racketeering activity," see *infra* notes 219-57 and accompanying text.

34. 18 U.S.C. § 1964(c) (1982).

35. ABA TASK FORCE REPORT, *supra* note 10, at 58. It almost makes one wonder what the fuss is about. The ABA Task Force added that one of those nine judgments was reversed, *B.F. Hirsch, Inc. v. Enright Refining Co.*, 577 F. Supp. 339 (D.N.J. 1983), *rev'd and remanded*, 751 F.2d 628 (3d Cir. 1984). However, that verdict was reinstated after the publication of the Task Force Report in *B.F. Hirsch, Inc. v. Enright Refining Co.*, 617 F. Supp. 49 (D.N.J. 1985).

36. ABA TASK FORCE REPORT, *supra* note 10, at 57.

37. See, e.g., *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347 (S.D.N.Y. 1983), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *American Sav. Ass'n v. Sierra Fed. Sav. & Loan Ass'n*, 586 F. Supp. 888 (D. Colo. 1984); *Bruns v. Ledbetter*, 583 F. Supp. 1050 (S.D. Cal. 1984); *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636 (C.D. Cal. 1983); *Noland v. Gurley*, 566 F. Supp. 210 (D. Colo. 1983); *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 558 F. Supp. 1348 (S.D.N.Y. 1983); *Noonan v. Granville-Smith*, 537 F. Supp. 23 (S.D.N.Y. 1981); *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256 (E.D. La. 1981); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736 (N.D. Ill. 1981); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975).

38. 553 F. Supp. 1347 (S.D.N.Y. 1983), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

treble damages for ordinary violations of criminal or tort laws."³⁹

The "nexus" requirement was not adopted by any court of appeals.⁴⁰ Other district courts noted that section 1964(c) was modeled after the treble damage provision of the antitrust laws⁴¹ and that the statement of findings and purposes for the Organized Crime Control Act of 1970⁴² "expressed [Congress'] concern that organized crime activities harm innocent investors and competing organizations [and] interfere with free competition."⁴³ These courts concluded that section 1964(c) standing, like standing under the antitrust laws, required an allegation of a competitive injury.⁴⁴

The competitive injury requirement, like the nexus requirement, was rejected by every court of appeals presented with the question.⁴⁵ A number of courts, however, without imposing a specific competitive injury requirement, had imposed a standing requirement that called for a so-called "racketeering" or "RICO-type" injury, different in kind from

39. *Id.* at 1360.

40. ABA TASK FORCE REPORT, *supra* note 10, at 171. See *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985); *Alcorn County v. United States Interstate Supplies, Inc.*, 731 F.2d 1160 (5th Cir. 1984); *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648 (7th Cir. 1984); *Owl Constr. Co., Inc. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540 (5th Cir.), *cert. denied*, 105 S. Ct. 118 (1984); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983); *Schacht v. Brown*, 711 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *cert. denied*, 464 U.S. 1008 (1983); *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982).

41. Clayton Act, § 4, 15 U.S.C. § 15 (1982), "Suits by persons injured; amount of recovery," provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Standing to sue under this provision has been held to require allegation of an "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

42. Pub. L. No. 91-452, 84 Stat. 922. RICO is Title IX of the OCCA. See *supra* note 5.

43. *Id.* at 923.

44. See, e.g., *Dakis v. Chapman*, 574 F. Supp. 757 (N.D. Cal. 1983); *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235 (S.D.N.Y. 1983); *Van Schaick v. Church of Scientology, Inc.*, 535 F. Supp. 1125 (D. Mass. 1982); *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207 (N.D. Ill. 1980).

45. ABA TASK FORCE REPORT, *supra* note 10, at 293. See *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984); *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *rev'd on other grounds*, 105 S. Ct. 3275 (1985); *Schacht v. Brown*, 711 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *cert. denied*, 464 U.S. 1008 (1983).

that caused by the commission of the underlying predicate offenses.⁴⁶

Some courts held that a section 1964(c) claim failed unless the plaintiff could show an "enterprise" separate from the person being sued.⁴⁷ And the court of appeals in *Sedima, S.P.R.L. v. Imrex Co.*⁴⁸ imposed a standing requirement of sorts on a RICO defendant, ruling that a civil RICO action could be brought only against a defendant who had already been criminally convicted of the predicate offenses.⁴⁹

None of these theories were universally adopted. Moreover, a single

46. See, e.g., *Harper v. New Japan Sec. Int'l, Inc.*, 545 F. Supp. 1002 (C.D. Cal. 1982), in which the court ruled that a RICO plaintiff "must allege not only injury from the predicate offenses, but injury of the type the statute was intended to prevent." *Id.* at 1007. In *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), the court reasoned that:

If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured by the pattern, and the pattern cannot be said to be the but-for cause of the injury.

Id. at 517 (emphasis in original). See also *Bruns v. Ledbetter*, 583 F. Supp. 1050 (S.D. Cal. 1984); *Freschi v. Grand Coal Venture*, 583 F. Supp. 780 (S.D.N.Y. 1984); *Morosani v. First Nat'l Bank of Atlanta*, 581 F. Supp. 945 (N.D. Ga. 1984); *Kaufman v. Chase Manhattan Bank*, 581 F. Supp. 350 (S.D.N.Y. 1984); *Willamette Sav. & Loan v. Blake & Neal Fin. Co.*, 577 F. Supp. 1415 (D. Or. 1984); *Bulk Oil (ZUG) A.G. v. Sun Co.*, 583 F. Supp. 1134 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1431 (2d Cir. 1984); *Gitterman v. Vitoulis*, 579 F. Supp. 423 (S.D.N.Y. 1983); *In re Action Indus. Tender Offer*, 572 F. Supp. 846 (E.D. Va. 1983); *Waste Recovery Corp. v. Mahler*, 566 F. Supp. 1466 (S.D.N.Y. 1983); *Noland v. Gurley*, 566 F. Supp. 210 (D. Colo. 1983); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352 (E.D. Mich. 1983).

47. For the definition of "enterprise," see *supra* note 12. In *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20 (N.D. Ill. 1982), the court reasoned that:

Section 1962(c) requires: (1) two parties, a "person" employed by or associated with an "enterprise"; and (2) participation by the "person" in the conduct of the "enterprise" via a "pattern of racketeering activity."

....

By elementary principles of statutory construction, the Section 1964(c) cause of action—a suit for "violation" of Section 1962—must be asserted against the violator under the latter section. That violator is the "person" that has engaged in the "unlawful" conduct. It would be an obvious distortion to permit suit against the "enterprise" that had itself been infiltrated by the "unlawful" conduct or participation of the "person"—the "enterprise" that may itself be a victim of the racketeering activity.

Id. at 23-24 (footnote omitted) (emphasis in original).

48. 741 F.2d 482 (2d Cir. 1984), *aff'd*, 105 S. Ct. 3275 (1985).

49. *Id.* at 496. The *Sedima* court of appeals was the first court to require a prior conviction. ABA TASK FORCE REPORT, *supra* note 10, at 210. Earlier, in *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667 (N.D. Ga. 1983), noting that the predicate acts must be criminal acts, the court concluded that "[u]nless the sufficient facts are alleged by either showing previous convictions or setting out probable cause, neither the defendant nor the court can ascertain what prior conduct is said to constitute a predicate act." *Id.* at 682 (emphasis added).

In *Taylor*, a RICO count was dismissed for failure to plead with particularity. *Id.* at 684. Though the alleged predicate acts were fraud offenses, *id.* at 680, the court did not so much invoke the requirement of Federal Rule of Civil Procedure 9(b), that averments of fraud be pled with particularity, as to graft an analogous requirement on a RICO claim generally. The

circuit would frequently produce contrary rulings.⁵⁰ The judges simply did not seem to know what to do with a racketeering act that was being

court stated "that it is appropriate to require that RICO be pled with the same particularity that is required in the pleading of fraud." *Id.* at 682.

Taylor found support for its probable cause requirement in the earlier decision of *Bache Halsey Stuart Shields Inc. v. Tracy Collins Bank Co.*, 558 F. Supp. 1042 (D. Utah 1983). *Taylor*, 572 F. Supp. at 683. *Bache Halsey*, too, had dismissed a RICO count for failure to "state the facts with enough specificity to establish probable cause." *Bache Halsey*, 558 F. Supp. at 1047. In *Bache Halsey*, the court reasoned that "[a]n offense is not 'indictable' merely because it is alleged. Rather, to be indictable it must be 'well-founded' and based on probable cause." *Id.* at 1045. *Bache Halsey* was followed in *Laterza v. American Broadcasting Co.*, 581 F. Supp. 408, 412 (S.D.N.Y. 1984), and in *Bennett v. E.F. Hutton Co.*, 597 F. Supp. 1547, 1560 (N.D. Ohio 1984).

The question of probable cause was considered by the court in *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985). In *Haroco*, the court stated:

To establish its case at trial, a civil plaintiff must surely prove the acts of racketeering, but the district courts in *Bache Halsey* and *Taylor* appear to have moved that requirement up to the pleadings stage. For several reasons, we do not agree that such specificity is required at the pleadings stage.

First, a determination of probable cause in the criminal context ordinarily involves some evaluation of the reliability of specific evidence. Even the most specific allegations do not establish probable cause unless they are reliable. We are, to say the least, perplexed as to how a court might undertake such evaluations of reliability

....

... [A] grand jury has significant investigative powers and resources, including a broad subpoena power. Before it decides whether to indict a person, it has extensive opportunities to discover and evaluate relevant facts. It should be obvious that a civil plaintiff has no similar discovery rights until it files its complaint. Yet the approach of the district court in *Bache Halsey* appears to require a plaintiff to establish a case before any discovery is permitted. . . . We see no grounds for demanding that a civil RICO plaintiff essentially plead evidence and prove the case in the complaint.

Id. at 404 (emphasis in original).

50. For example, compare two decisions that occurred within two weeks of each other in the Southern District of New York. In *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235 (S.D.N.Y. 1983), Judge Cooner stated:

[I]t seems appropriate to limit the extraordinary private remedy of § 1964 to the class of plaintiffs who have suffered a competitive injury by reason of the defendant's racketeering activities. The legislative history reveals that RICO's civil remedy was modeled after the relief available in the antitrust area. The analogy to the antitrust laws is reinforced by the language of § 1964(c), which is virtually identical to that of § 4 of the Clayton Act, 15 U.S.C. § 15, and gives standing only to one "injured in his business or property." In the statement of findings and purposes which accompanied RICO, Congress expressed its concern that "organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, [and] seriously burden interstate and foreign commerce." Pub. L. 91-454 at § 1. This suggests an injury to competition

Id. at 1241 (citations omitted). Two weeks later, Judge Duffy, writing in *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231 (S.D.N.Y. 1983), analyzed the same issue somewhat differently:

I do not believe that the "racketeering" and "competitive injury" requirements are consistent with the legislative history. . . . The legislative history shows that Congress rejected early efforts to draft RICO-like statutes within the antitrust context, apparently on the grounds that anti-trust concepts like "standing" and "proximate

used against everyone but racketeers. All that, of course, was before the Supreme Court decided *Sedima*.

C. *Sedima, S.P.R.L. v. Imrex Co.*⁵¹

1. Statement of the case

The *Sedima* case arose out of a joint venture between Imrex Co., Inc. (Imrex), an American company, and Sedima, S.P.R.L. (Sedima), a Belgian company, to sell electronic components to European customers.⁵² Sedima alleged that Imrex had furnished Sedima with deliberately falsified invoices, credit memos and purchase orders in order to inflate costs and fraudulently deprive Sedima of its share of the venture's profits. The RICO counts were based on the predicate offenses of mail fraud and wire fraud.⁵³ In dismissing those counts, the trial court ruled that Sedima lacked standing to sue under section 1964(c).⁵⁴ The court relied on two distinct lines of cases. One line had limited standing to claimants who could allege a "competitive injury"; the other required a "racketeering injury."⁵⁵ Ruling that one or the other of these theories was correct, the trial court determined, without stating a preference, that plaintiff's RICO counts failed under either of them.⁵⁶

2. The Second Circuit's opinion

The court of appeals, affirming the trial court, rejected the "competitive injury" requirement, narrowing the field to a distinct racketeering, or "RICO-type," injury "of the kind the statute was designed to deter."⁵⁷ The court defined this injury in terms which suggested a revival of the

cause" would create "inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recover." [sic]

Moreover, an examination of the statute's language reveals no basis for the "racketeering injury" requirement. . . .

Because the "racketeering injury" requirement seems contrary to the language of the statute and is unsupported in the legislative history, I believe it suffices for plaintiff to allege injury caused by the predicate acts.

Id. at 1240-41 (citations omitted).

51. 105 S. Ct. 3275 (1985).

52. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 484 (2d Cir. 1984), *rev'd*, 106 S. Ct. 3275 (1985).

53. *Id.* at 485.

54. *Sedima, S.P.R.L. v. Imrex Co.*, 574 F. Supp. 963, 965 (E.D.N.Y. 1983), *aff'd*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985). "For purposes of the question before me I need not determine which of these two constructions is more appropriate, since plaintiff's claim fails under either one." *Id.*

55. See *supra* text accompanying notes 40-46 for a discussion of these two limiting requirements.

56. *Sedima*, 574 F. Supp. at 965.

57. *Sedima*, 741 F.2d at 496.

"nexus" requirement.⁵⁸ Reasoning that RICO was enacted to deal with the harm caused to competition and to the market by organized crime's infiltration of legitimate businesses and operation of illegitimate businesses, the court concluded that only "this kind of harm" justifies standing to sue under RICO.⁵⁹

The court also ruled that a civil RICO action could be brought only against a defendant who had been criminally convicted of the predicate offenses.⁶⁰ The court distinguished the Clayton Act provision which provided a cause of action to anyone injured in his business or property "*by reason of anything forbidden in the antitrust laws*" from RICO's provision of standing to sue to one injured "*by reason of a violation of section 1962.*"⁶¹ The difference in language suggested to the court that Congress intended that a private civil RICO suit could be brought only against a defendant who had been convicted of at least the predicate acts.⁶² The court concluded that had Congress intended "to permit defendants in every 'garden-variety' fraud or securities violation case to be stigmatized as 'racketeers,' on the basis of a preponderance of the evidence, it would have said so in plainer language than it did."⁶³

58. See *supra* notes 37-39 for a discussion of the "nexus" requirement.

59. 741 F.2d at 495-96.

60. *Id.* at 496.

61. *Id.* at 498 (emphasis in original). See *infra* Appendix A for the full text of § 1964(c); see *supra* note 41 for the full text of the Clayton Act, § 4, 15 U.S.C. § 15 (1982).

62. *Sedima*, 741 F.2d at 497-98 (citing 18 U.S.C. § 1962 (1982)).

63. *Id.* at 503 (footnote omitted). Similarly, the court questioned whether Congress intended "to give civil courts power to determine whether an act is 'indictable' in the absence of a properly returned indictment or 'chargeable' absent an information." *Id.* at 500. Citing the fifth amendment provision that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury," the court concluded that without the requirement of a prior conviction for civil RICO actions, "every private plaintiff becomes his own one-person grand jury, or in the case of state felonies chargeable by information, his own prosecutor." *Id.* Thus, the court determined that the requirement of a prior conviction avoids the "serious constitutional questions" inherent in a civil remedy designed partly "to avoid the constitutional protections of the criminal law." *Id.* at 500 n.49.

Absent a prior conviction requirement, the court argued that a plaintiff in a civil RICO suit should be required to prove the predicate acts beyond a reasonable doubt, inasmuch as RICO calls only for criminal conduct to be punished. *Id.* at 501-02. The court determined that to expect juries to understand and apply different standards of proof to different elements of the cause of action would create intolerable confusion. *Id.* at 502.

The court concluded that the criminal conviction requirement does not pose a "significant additional barrier" to a RICO plaintiff, since the defendant would be able to block discovery in any event by invoking the fifth amendment wherever a criminal conviction is possible. *Id.* at 503.

It is understandable that the court of appeals, faced with the implications of attaching a criminal "stigma" by means of a civil burden of proof, discerned a constitutional dilemma that could only be resolved by choosing between a prior conviction requirement and a stricter standard of proof. The Supreme Court, however, did "not view the statute as being so close to the

3. The Supreme Court reversal

The Supreme Court first expressed its understanding of the lower court's "concern over the consequences of an unbridled reading of the statute,"⁶⁴ and then proceeded to deliver one. Relying on "the plain words of the statute,"⁶⁵ the Court stated that "we cannot agree with the court below that Congress could have had no 'inkling of [§ 1964(c)'s] implications.' Congress' 'inklings' are best determined by the statutory language that it chooses, and the language it chose here extends far beyond the limits drawn by the Court of Appeals."⁶⁶

Accordingly, the Court ruled that neither the statutory language nor the legislative history warrants a requirement of a prior conviction.⁶⁷ Without deciding what standard of proof is applicable to a civil RICO proceeding, the Court indicated that a preponderance would be acceptable.⁶⁸ Pointing to "a number of settings" in which "conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard,"⁶⁹ the Court stated that the fact that "offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction."⁷⁰

The Court stated that "a civil RICO proceeding leaves no greater [stigma] than do a number of other civil proceedings."⁷¹ Further, the Court stated that the prior conviction requirement for the predicate acts alone does not protect against an unfair imposition of the "racketeer" label, and any problem with "stigmatizing a garden variety defrauder by means of a civil action . . . is not reduced by making certain that the

constitutional edge." *Sedima*, 105 S. Ct. at 3283. The Court stated that the same conduct can legitimately result in both criminal and civil liability, noting "[t]he familiar provisions for both criminal liability and treble damages under the antitrust laws." *Id.* Of course, the Clayton Act, § 4, 15 U.S.C. § 15 (1982) provides treble damages for conduct which may also give rise to criminal liability under the antitrust laws. It does not, however, designate the same conduct proved in a civil suit as criminal. RICO does just that.

64. 105 S. Ct. at 3278.

65. *Id.* at 3285 n.13.

66. *Id.* (quoting *Sedima*, 741 F.2d at 492) (brackets supplied by Court).

67. *Id.* at 3281-84.

68. *Id.* at 3282-84.

69. *Id.* at 3282 (citing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972); *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938); *United States v. Regan*, 232 U.S. 37, 47-49 (1914)).

70. *Id.* at 3283.

71. *Id.*

defendant is guilty of *fraud* beyond a reasonable doubt."⁷²

The Court concluded its rejection of the prior conviction requirement by noting that such a requirement would be inconsistent with Congress' underlying policy concerns.⁷³ Pointing out that 18 U.S.C. § 1964(c)⁷⁴ is a private attorney general provision designed in part "to fill prosecutorial gaps,"⁷⁵ the Court determined that that purpose would be defeated "if private suits could be maintained only against those already brought to justice."⁷⁶

Turning to address the requirement of a RICO-type injury, the Court noted the "vagueness of that concept"⁷⁷ in overruling the court of appeals. Stating that "'racketeering activity' consists of no more and no less than commission of a predicate act,"⁷⁸ the Court concluded that where the defendant's conduct in violation of RICO's prohibitions injures the plaintiff in his business or property, the plaintiff has a section 1964(c) claim.⁷⁹ The Court stated that there "is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement."⁸⁰

In thus overturning both the prior conviction and standing requirements, the Court has given civil RICO its most expansive reading. The Court recognized "that private civil actions under the statute are being brought almost solely against [respected businesses allegedly engaged in a pattern of specifically identified criminal conduct], rather than against the archetypal, intimidating mobster."⁸¹ But, the Court continued, "this

72. *Id.* at 3283 (emphasis in original). It is arguable whether a prior conviction requirement, even for the predicate acts alone, would not protect against an unfair imposition of the racketeer label. Such a requirement would carry with it the additional protection of the higher burden of proof appropriate to criminal convictions. Even so, the Court noted that to the extent that a § 1964(c) action is to be considered quasi-criminal, thereby calling for the protections applicable to criminal proceedings, the solution lies not in ensuring that such protections were previously afforded in criminal proceedings but in providing those protections directly. *Id.* at 3283-84. One such solution might be the variable standard of proof which the court of appeals rejected as impractical. For a discussion of the standard of proof, see *infra* notes 192-217 and accompanying text.

73. 105 S. Ct. at 3284.

74. 18 U.S.C. § 1964(c) (1982).

75. 105 S. Ct. at 3284.

76. *Id.*

77. *Id.*

78. *Id.* at 3285.

79. *Id.*

80. *Id.*

81. *Id.* at 3287. The Court further acknowledged that "RICO is evolving into something quite different from the original conception of its enactors." 105 S. Ct. at 3287. But, the Court continued, the "fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* (quoting Haroco,

defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress.”⁸²

IV. THE DEBATE

Critics of RICO’s expansive scope, now endorsed by the Supreme Court’s reading of the statute, present four main arguments for limiting the private action. First, they argue that the statute, intended as a weapon against organized crime, is being used abusively against the “legitimate businesses” it was designed to protect.⁸³ Second, they argue that RICO’s treble damages provision is displacing “carefully crafted” federal regulatory schemes, particularly in the securities industry.⁸⁴ Third, they argue that the statute has federalized areas of law traditionally governed by the states.⁸⁵ Finally, they argue that the federalization of state law threatens to inundate the federal court system with actions brought under 18 U.S.C. § 1964(c).⁸⁶

A. Argument: Civil RICO is Widely Abused

1. The racketeering statute has become a weapon against legitimate businesses

Section 1964(c)’s critics variously describe the situations in which the remedy has been invoked as “common commercial disputes,”⁸⁷ “ordinary commercial disputes,”⁸⁸ “mundane disputes,”⁸⁹ “conventional

Inc. v. American Nat’l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), *aff’d*, 105 S. Ct. 3291 (1985)). See *supra* notes 5 & 19 for a discussion of Congress’ original conception of RICO; *supra* note 24 and accompanying text for statistical analyses of the statute’s subsequent use.

82. 105 S. Ct. at 3287.

83. See *infra* notes 87-96 & 140-51 and accompanying text.

84. See *infra* notes 98-102 & 131-37 and accompanying text.

85. See *infra* notes 103-30 and accompanying text.

86. 18 U.S.C. § 1964(c) (1982). These related issues are discussed concurrently, *infra* notes 103-30 and accompanying text.

87. *Hearings on RICO Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (Oct. 2, 1985) (statement of Philip J. Hoblin, Jr., Gen. Couns. and Executive Vice President, Shearson/Lehman Bros. Inc.) (official government printing not yet available; cited from text of prepared statement, at 3) [hereinafter cited as P. Hoblin, *Hearings on RICO*].

88. J. Keeney, *Hearings on RICO*, *supra* note 22, at 22.

89. *Hearings on RICO Before the Subcomm. on Oversight of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (Sept. 24, 1985) (statement of Irvin B. Nathan, appearing on behalf of Am. Property & Casualty Ins. Indus.) (official government printing not yet available; cited from text of prepared statement, at 4) [hereinafter cited as I. Nathan, *Hearings on RICO*].

business disputes,"⁹⁰ "common garden variety disputes"⁹¹ and, perhaps in acknowledgment of the criminal conduct that is a necessary element of a RICO count, as "garden-variety fraud."⁹²

Irving Nathan, testifying before the House Judiciary Committee on behalf of the American Property and Casualty Insurance Association, presented examples of conventional business disputes which have been brought within the scope of section 1964(c) by allegations of fraud:

At the last Senate hearing, a number of Senators asked for concrete examples of abuse of private RICO. We are here today to provide them. . . .

[I]n the insurance industry, in a series of cases in the federal district court in Georgia, approximately fifteen insurance companies have been sued in private civil RICO actions for "mail fraud." In these cases, plaintiffs, often as purported representatives of a class, contended that under the Georgia no-fault statute, insurers may not subrogate claims for which they have made full payment under automobile collision coverage and that these companies have injured their policyholders by "limiting" them to a single full recovery. The Georgia Supreme Court has recently rejected the plaintiffs' interpretation of the state no-fault statute. However, this ruling came too late for some insurance companies which had already made multimillion-dollar settlements to avoid protracted litigation and treble-damage, class action exposure. Out of these settlements, over \$2,000,000, in excess of one-third of the total recovery, was awarded to the plaintiffs' attorneys who concocted this "racketeering" claim.

These cases point out how, through RICO, a disagreement regarding the proper interpretation of a complicated state statute or an insurance policy can be escalated into a federal cause of action alleging fraud and racketeering and seeking treble

90. *Hearings on RICO Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 3 (Oct. 9, 1985) (statement of Roger E. Middleton, appearing on behalf of United States Chamber of Commerce) (official government printing not yet available; cited from text of prepared statement, at 3) [hereinafter cited as R. Middleton, *Hearings on RICO*].

91. *Hearings on RICO Before the Subcomm. on Oversight of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (Sept. 24, 1985) (statement of Edward I. O'Brien, appearing on behalf of Securities Indus. Ass'n) (official government printing not yet available; cited from text of prepared statement, at 6) [hereinafter cited as E. O'Brien, *Hearings on RICO*].

92. *Sedima*, 741 F.2d at 488.

damages and attorney's fees.⁹³

Critics further argue that even where such allegations are wholly unmerited, the mere threat of the "ruinous exposure"⁹⁴ of a treble damages judgment, in addition to the potential "racketeer" stigma that trial publicity attaches even to a successful defendant, induce defendants named in RICO suits to settle the unwarranted claims.⁹⁵ In addition to

93. I. Nathan, *Hearings on RICO*, *supra* note 80, at 16-17. Nathan offered further examples:

[I]n *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352 (E.D. Mich. 1983), Lloyd's of London and the Lincoln Insurance Company, consistent with state-mandated claim settlement procedures, denied a claim under a fire insurance policy because they believed that the fire had been set by one of the plaintiffs. Plaintiffs sued, alleging *inter alia*, a violation of RICO in that "defendants [through the use of the mails] have engaged in a scheme to defraud by fraudulently refusing to pay claims without valid reasons in order to force persons to compromise their claims for an amount less than they are entitled to under the insurance policies." *Id.* at 356.

As another example, in *Activision, Inc. v. National Union Fire Insurance Co.*, a suit recently filed in federal district court in California, an insurance company was sued as a racketeer when it refused to make payments under, and sought to rescind, a director's and officer's liability policy on the ground that misstatements had been made in the policy application. Plaintiffs allege as a RICO violation that defendant was engaged in a scheme to issue such policies and collect premiums therefor with no intention of fulfilling its obligations under these policies.

Id.

94. See *infra* text accompanying note 145.

95. J. Hoblin, *Hearings on RICO*, *supra* note 87, at 4-5. Hoblin's position as General Counsel and Executive Vice President at Shearson/Lehman Brothers appears to have provided him with considerable RICO experience:

The experience of Shearson Lehman Brothers with civil RICO parallels that of the industry as a whole; that is, a lengthy period of inactivity followed by a rapid acceleration of cases. The first RICO case brought against us occurred in 1982, twelve years after the statute was enacted. By the middle of 1985, a total of 53 such cases were brought against the firm. And since the *Sedima* decision, plaintiffs in five previously filed Federal Court actions have made application to the courts to amend their pleadings to include a RICO count.

Id. at 3. Hoblin offered the following examples of RICO-induced settlements:

In 1980, an individual opened an account in one of our Connecticut offices with a portfolio of securities valued at \$70,000. Two years later, following steady trading losses aggregating some \$40,000, this individual filed suit, alleging that the investments made were unsuitable and that all the purchases and sales of securities over the two year period were unauthorized, and that the broker was churning the account, with the sole object of generating commissions. The suit alleged violations of both federal securities laws and RICO, and asked in excess of \$200,000 in compensatory damages. Although viable defenses existed, the downside risk of losing this case under RICO would have aggregated more than \$600,000 plus attorneys' fees of some \$50,000. Ultimately, after numerous unsuccessful motions to have the RICO portion of the Complaint dismissed, we made a business decision to settle for the sum of \$85,000, more than twice the amount of trading losses.

In another situation, a New Jersey resident opened an investment account with us in 1982 and over the next 18 months deposited over \$2 million into his account. In August 1983, following trading losses of over \$100,000, this individual, not incidentally an experienced investor and successful businessman, instituted an action alleging material misrepresentations concerning the investments proposed by our broker. The suit alleged violations of the securities laws and RICO, and asked some

the potential financial burden at risk in a RICO suit, it has been suggested that public relations conscious companies are especially concerned about the adverse publicity generated by a "racketeer" trial even if they expect to, and do, win. Such companies, it is argued, will settle unjustified claims rather than expose themselves to such publicity.⁹⁶

2. Civil RICO supplants "virtually every" federal regulatory scheme

Critics of the current scope of section 1964(c) also object to the provision's encroachment upon other established areas of law. As Justice Marshall noted in his dissenting opinion in *Sedima, S.P.R.L. v. Imrex Co.*:⁹⁷

[T]he broad reading of the civil RICO provision . . . displaces important areas of federal law. For example, one predicate offense under RICO is "fraud in the sale of securities." By alleging two instances of such fraud, a plaintiff might be able to bring a case within the scope of the civil RICO provision. It does not take great legal insight to realize that such a plaintiff would pursue his case under RICO rather than do so solely under the Securities Act of 1933 or the Securities Exchange Act of 1934, which provide both express and implied causes of action for violations of the federal securities laws. Indeed, the federal securities laws contemplate only compensatory damages and ordinarily do not authorize recovery of attorney's fees. . . .
 . . . [Civil RICO] virtually eliminates decades of legislative

\$250,000 in damages. Despite reasonable confidence in our ability to defend, the prospect of confronting a RICO award of over \$800,000 in the event of a negative decision forced a settlement on our part.

Finally, in a case of larger magnitude, four individuals who had invested a total of over \$1 million in the same stock over the period 1981-1984, brought suit against the firm in Atlanta in 1984. The four alleged securities laws and RICO violations, claiming misrepresentation in connection with recommendations of the stock by our brokers and asking a total of \$1.4 million in compensatory damages. Again, despite confidence in mounting a credible defense, the possibility of paying well over \$4 million in damages and attorneys' fees proved sufficiently daunting so as to force us to settle for \$250,000.

. . . .
 I offer [these examples] as representative of a large and growing number of instances where we believe a reasonable case could be made in defense of our conduct; yet we cannot risk making this case because of the artificial imposition of a RICO count, despite not the remotest connection to "organized crime and racketeering."

Id. at 4-6.

96. *Id.* at 3.

97. 105 S. Ct. 3295 (1985) (Marshall, J., dissenting in *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985) and *American Nat'l Bank & Trust Co. of Chicago v. Haroco, Inc.*, 106 S. Ct. 3291 (1985)).

and judicial development of private civil remedies under the federal securities laws. Over the years, court [sic] have paid close attention to matters such as standing, culpability, causation, reliance and materiality, as well as the definitions of "securities" and "fraud." All of this law is now an endangered species⁹⁸

The effect of section 1964(c) on the securities laws is further illustrated in the remarks of S.E.C. Commissioner Marinaccio to the ABA Task Force:

First, RICO appears to permit private plaintiffs to recover treble damages in cases where the Congress has expressly limited recovery under the securities laws to actual damages

Second, the breadth of RICO's provisions may even enable certain private plaintiffs to make out claims under RICO where they would not have standing to sue, or there is no implied right of action, under the federal securities laws. Stated differently, RICO may permit private recovery for securities law violations which the Congress and the courts have determined should not give rise to private liability under the securities laws. This result is made even more anomalous by the fact that the RICO plaintiff may obtain *treble* recovery

Finally, it appears that private plaintiffs who can allege similar injury may be able to recover under RICO for violations of the securities laws which the defendant committed against third parties—notwithstanding the fact that such plaintiffs could not recover at all under the federal securities laws.⁹⁹

A case could be made that Commissioner Marinaccio's illustrations argue more forcefully that RICO provides a useful supplement, rather than encroachment, to the securities law by providing remedies where the securities laws provide none. But Edward I. O'Brien, president of the Securities Industries Association, suggests that the specific remedies provided in the securities laws are tailored to the "technical . . . nature" of securities fraud itself, defined by the federal securities laws which elevate "ordinary contract and agency disputes between brokers and their customers into the realm of fraud."¹⁰⁰ O'Brien asserted:

For example, if a registered representative, for a broker-dealer,

98. *Id.* at 3294-95 (Marshall, J., dissenting) (citations omitted).

99. Marinaccio, *Memorandum for the American Bar Association Civil RICO Task Force*, ABA TASK FORCE REPORT, *supra* note 9, at app. F, at 3-5 (emphasis in original).

100. E. O'Brien, *Hearings on RICO*, *supra* note 91, at 5.

recommends a security to a customer on the basis that it is a very conservative investment and, subsequently, the investment proves to have been highly speculative and goes bankrupt, it is not unusual for a plaintiff's attorney to file suit on the basis that the federal securities fraud laws had been violated. Absent these laws, it would ordinarily be thought that the controversy involved, at most, either a violation of contract or some failure under normal agency laws. The federal securities laws have taken such contract disputes and elevated them into the realm of fraud.¹⁰¹

In words which seem to sum up the attitude of both the securities and banking industries, Donald E. Egan, testifying before the House Judiciary Committee, warned that "unless remedial steps are taken by Congress RICO may soon replace *virtually every* existing federal regulatory scheme insofar as private remedies are concerned."¹⁰²

3. Civil RICO federalizes state law and burdens the federal court system

Section 1964(c)'s critics have also expressed concern over the federalization of state common law remedies and the prospect of burying the federal court system in an avalanche of civil RICO suits.¹⁰³ Evidence of these related propositions exists in the high percentage of RICO suits based on mail fraud and wire fraud¹⁰⁴ and in the tremendous growth in

101. *Id.* at 5 n.7. Perhaps it is naive to expect a registered representative for a broker-dealer to be able to distinguish a highly speculative investment from a very conservative one. For an example of a registered representative unable to make the distinction, see *Yancoski v. E.F. Hutton*, 581 F. Supp. 88 (E.D. Pa. 1983); *supra* note 29.

102. *Hearings on RICO Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (Oct. 29, 1985) (statement of Donald E. Egan) (official government printing not yet available; cited from text of prepared statement, at 9) (emphasis added) [hereinafter cited as D. Egan, *Hearings on RICO*].

103. I. Nathan, *Hearings on RICO*, *supra* note 89, at 22.

104. See *supra* notes 22-24 and accompanying text. The federal mail fraud and wire fraud statutes offer no private right of action. *Ryan v. Ohio Edison Co.*, 611 F.2d 1170, 1178 (6th Cir. 1979) (no private right of action under 18 U.S.C. § 1341, mail fraud); *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974), *cert. denied*, 423 U.S. 837 (1975) (no private right of action under 18 U.S.C. § 1343, wire fraud). Consequently, fraud is normally compensable, if at all, only under state law.

The objection that RICO federalizes matters appropriately left to the states is always raised in the context of the civil remedy. If this objection is valid it should be valid for criminal RICO, as well. Mail fraud and wire fraud are, however, federal crimes; moreover, the requirements of both are not necessarily the same as for common law fraud offenses. For example, conviction of violation of the mail fraud statute does not require a showing of reli-

the number of RICO claims in recent years.¹⁰⁵ And now that *Sedima* has made early dismissal less likely, the number of RICO claims is expected to grow at an even faster rate.¹⁰⁶ John Marshall Finch, representing The National Manufacturers Association, viewed with alarm the bar education seminars "being prepared across the country to help private litigators gear up to the new litigation opportunities against legitimate business."¹⁰⁷ As stated in the national advertisement for one series of seminars:

In essence, for the first time there is a federal commercial fraud statute—RICO—that cuts across the entire spectrum of civil matters and provides treble damage remedies and attorney's fees. Consequently, RICO is likely to be a growing, and

ance, a usual element of common law fraud. *United States v. Williams*, 545 F.2d 47 (8th Cir. 1976).

Nonetheless, not a single objection has been voiced in Senate nor House hearings—nor elsewhere—to the nine state law felonies ("any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs") enumerated as predicate offenses in 18 U.S.C. § 1961(1)(A) (1982) either in connection with § 1964 (civil remedies) or § 1963 (criminal penalties). Obviously, these offenses are not problematic to the "legitimate businesses" whose advocates have testified before Congress. Arguably, these offenses are not as vague and therefore not as subject to abuse as the fraud offenses may be. Also, these offenses are more closely related to the common conception of racketeers, and therefore more related to a target—everyone should be able to agree—aimed at by the enacting Congress. Nevertheless, like the common law fraud that is being "federalized," these nine offenses are state matters which are brought into federal court when committed in conjunction with the other elements that make up a RICO count. As the NAAG/NDAA states:

[T]he current controversy over RICO has not centered on its criminal provisions or its possible civil application in the areas of violence, the provision of illicit goods and services, or the corruption of governmental entities or unions. . . . Instead the controversy has focused almost exclusively on private suits brought in the commercial fraud area.

Hearings on RICO Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. (Oct. 1985) (statement of the Nat'l Ass'n of Att'ys Gen. and Nat'l Dist. Att'ys Ass'n) (official government printing not yet available; cited from text of prepared statement, at 9) [hereinafter cited as NAAG/NDAA, *Hearings on RICO*]. Those spokespersons who profess concern about federalization are either themselves unaware of the magnitude of the problem, or the entire issue is a smokescreen sent up to obscure the true issues.

105. The ABA Task Force reports that "[o]f approximately 270 trial court decisions in the database, three percent were decided before 1980, two percent in 1980, seven percent in 1981, 13 percent in 1982, 33 percent in 1983, and 43 percent in 1984." ABA TASK FORCE REPORT, *supra* note 10, at 55.

106. O'Brien stated that "the number of decided [civil RICO] cases, to date, . . . are but the first trickles of an onrushing flood created by the bursting of the dam as the result of the *Sedima* case." E. O'Brien, *Hearings on RICO*, *supra* note 91, at 3.

107. *Hearings on RICO Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (Oct. 9, 1985) (statement of John Marshall Finch, appearing on behalf of the Nat'l Ass'n of Mfrs.) (official government printing not yet available; cited from text of prepared statement, at 9) [hereinafter cited as J.M. Finch, *Hearings on RICO*].

prominent feature of the commercial dispute landscape in cases ranging from corporate takeovers to loan defaults.¹⁰⁸

Donald E. Egan suggested that state laws already provide adequate remedies for common law frauds, precluding any need for RICO to operate in these areas.¹⁰⁹ Moreover, a growing number of states have passed their own so-called "little RICO" statutes,¹¹⁰ thus eliminating any necessity that might otherwise have been perceived for the federal courts to be burdened with these actions.¹¹¹

B. Rebuttal: There Is Scant Evidence that Civil RICO Is More Abused than any Other Statute

1. Civil RICO neither significantly displaces state law nor burdens the federal courts

The concern for the burden on the federal courts may be premature. Though huge increases in the number of reported section 1964(c) decisions occurred in each of the years following 1980—tripling in 1981, nearly doubling in 1982 and more than doubling in 1983—only a thirty percent increase occurred in 1984 followed by an increase of about

108. *Id.* at 10 (citing *Legal Times*, Aug. 5, 1985, at 9, col. 1).

109. D. Egan, *Hearings on Rico*, *supra* note 102, at 10. Egan, who represented the defendant in *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 577 F. Supp. 111 (N.D. Ill. 1983), *aff'd in part and rev'd in part*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985) (companion case to *Sedima*), argued that identical protections are available in twenty-two (now twenty-three) states. Thus, he concluded that: "[E]ven if the opponents of any change in the federal RICO statute are correct in their claims that an amendment will lessen its availability for criminal and civil governmental prosecutions, identical provisions would still be available under state law." D. Egan, *Hearings on Rico*, *supra* note 102, at 10. See *infra* note 110 for a list of the state "little RICO" statutes.

110. The so-called "little RICO" statutes are: ARIZ. REV. STAT. ANN. §§ 13-2301 to 2317 (West 1978 & Supp. 1985); CAL. PENAL CODE § 186 (West Supp. 1985) (no private civil action); COLO. REV. STAT. §§ 18-17-101 to -109 (Supp. 1985); CONN. GEN. STAT. ANN. §§ 53-393 to -403 (West 1985); FLA. STAT. ANN. §§ 895.01-.09 (West Supp. 1985); GA. CODE ANN. §§ 26-3402 to -3414 (1983 & Supp. 1985); HAWAII REV. STAT. §§ 842-1 to -12 (1976) (actual damages and attorney's fee); IDAHO CODE §§ 18-7801 to -7805 (Supp. 1985); ILL. REV. STAT. ch. 56-1/2, §§ 1651-1659 (Smith-Hurd 1985) (limited to narcotics); IND. CODE ANN. §§ 34-4-30.5-1 to -6, 35-45-6-1 to -2 (Burns 1985); LA. REV. STAT. ANN. § 15:1351-1356 (West 1985) (limited to narcotics; no private civil action); MISS. CODE ANN. §§ 97-43-1 to -11 (Supp. 1985); NEV. REV. STAT. §§ 207.350-.520 (1983); N.J. STAT. ANN. §§ 2C:41-1 to -6.2 (West 1982); N.M. STAT. ANN. §§ 30-42-1 to -6 (1985); N.D. CENT. CODE §§ 12.1-06.1-01 to -05 (1985); 1985 Ohio Legis. Bull. §§ 1226-1234 (Anderson) (to be codified at OHIO REV. CODE ANN. §§ 2923.31-.36); OR. REV. STAT. §§ 166-715-35 (1983); PA. CONS. STAT. ANN. tit. 18 § 911 (Purdon 1983) (no private civil action); P.R. LAWS ANN. tit. 25, § 971 (1979 & Supp. 1984) (no private civil action); R.I. GEN. LAWS §§ 7-15-1-11 (1985); UTAH CODE ANN. §§ 76-10-1601 to -08 (Supp. 1985); WASH. REV. CODE ANN. §§ 9A.82.010-.901 (Supp. 1986); WIS. STAT. ANN. §§ 946.80-.87 (West Supp. 1985).

111. D. Egan, *Hearings on Rico*, *supra* note 102, at 10.

twenty to twenty-five percent in 1985.¹¹² This apparent leveling off may be nothing more than the result of pre-*Sedima* judicial restrictions which rendered such suits futile in some jurisdictions (or resulted in early, unreported dismissals of RICO counts).¹¹³ If this assessment is accurate, the proliferation will likely resume in the post-*Sedima* era. It is also possible, however, that the period of discovery and resulting proliferation is over.

In any event, the RICO experience furnishes evidence neither of a significant displacement of state law nor of a burden to the federal court system. The Department of Justice reported that section 1964(c) suits constitute less than one-half percent of the annual federal private civil caseload and that most of the suits could have been brought in federal courts anyway.¹¹⁴ Thus, section 1964(c) has increased the federal *civil* caseload by less than one quarter of one percent, and this figure is further reduced when the *total*—civil and criminal—caseload is considered.¹¹⁵

Nor is it certain, as has been suggested, that state laws provide adequate remedies for claims now brought under section 1964(c).¹¹⁶ It has been argued that section 1964(c) provides a forum where all defendants in a single action may be brought together who otherwise might be reachable only in a multitude of suits scattered throughout various states.¹¹⁷ Of equal importance, the award of compensatory damages, a usual state common law remedy, can never adequately compensate a loss where attorneys' fees must be paid out of the amount recovered. As Pamela Gilbert, staff attorney for the United States Public Interest Research Group, has testified:

Although additional recovery, such as punitive damages, may be available [under state common law causes of action], they are discretionary with the court and can not be relied upon by a plaintiff. This precludes many victims of fraud, whose actual losses are less than the costs of a lawsuit, from suing the responsible party. This is a large class of victims since fraud schemes are often designed to swindle relatively small amounts

112. See *supra* note 105. There were 141 federal district court civil RICO decisions in 1985. Available Jan. 19, 1986, on LEXIS, Genfed library, Dist file.

113. See *supra* notes 20-50 and accompanying text for a discussion of these limitations.

114. J. Keeney, *Hearings on Rico*, *supra* note 22, at 25.

115. Egan suggests, however, that the burdens imposed by RICO suits are not to be measured by quantity of suits alone: "Hardly a RICO complaint filed today is not the subject of a barrage of motions addressed to its sufficiency—all of which are costly to litigants and time consuming for the judges." D. Egan, *Hearings on Rico*, *supra* note 102, at 7. Much of this problem, of course, stems from the many uncertainties concerning the scope of RICO, some of which have been clarified by *Sedima*.

116. 18 U.S.C. 1964(c) (1982).

117. See *infra* text accompanying note 286.

of money from a large number of people.¹¹⁸

Where such a suit is instituted, any settlement must be for a fraction of the actual loss.¹¹⁹ The National Association of Attorneys General and National District Attorneys Association (NAAG/NDAA) cited studies showing that, as a result of the treble damages authorized by the Clayton Act, "most antitrust suits are settled now at close to actual damages."¹²⁰ Thus, the NAAG/NDAA concluded that "it may be necessary to authorize *treble* damages to assure that deserving victims receive *actual* damages in the RICO area."¹²¹ Put another way, "RICO is a part of a very long trend toward economic justice for victims of crime."¹²²

Additionally, compensatory damages provide no deterrent to profitable misconduct. In the words of the NAAG/NDAA:

If our society authorizes the recovery of only actual damages for deliberate anti-social conduct engaged in for profit, it lets the perpetrator know that if he is caught, he need only return the misappropriated sums. If he is not caught, he may keep his ill-gotten gains, and even if he is caught and sued, he knows that he may be able to defeat part of the damage claims or at least compromise it. In short, the balance of risk under traditional simple damage recovery provides little disincentive to those who engage in such conduct.¹²³

It has been further suggested that the existence of little-RICO statutes in twenty-three states,¹²⁴ with more pending, indicates that, even without the federal RICO statute, "identical provisions would still be available under state law."¹²⁵ But twenty-seven states have no little-RICO legislation, and of those that do, several provide no private civil

118. *Hearings on RICO Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (Oct. 29, 1985) (statement of Pamela Gilbert, appearing on behalf of United States Pub. Interest Research Group) (official government printing not yet available; cited from text of prepared statement, at 4) [hereinafter cited as P. Gilbert, *Hearings on RICO*].

119. *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 399 n.16 (1984), *aff'd*, 105 S. Ct. 3291 (1985).

120. NAAG/NDAA, *Hearings on RICO*, *supra* note 104, at 25.

121. *Id.* at 25-26 (emphasis in original).

122. *Hearings on RICO Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 7 (Oct. 9, 1985) (Statement of Steven Twist, Assistant Att'y Gen. for the State of Ariz., appearing on behalf of the Nat'l Ass'n of Att'ys Gen.) (official government printing not yet available, cited from text of prepared statement) [hereinafter cited as S. Twist, *Hearings on RICO*].

123. NAAG/NDAA, *Hearings on RICO*, *supra* note 104, at 24-25.

124. See *supra* note 110 for a list of the 23 states.

125. See *supra* notes 109-12 and accompanying text.

remedy.¹²⁶ Just as it is premature to worry about the burden imposed on the federal court system by section 1964(c), it is premature to rely upon the little-RICOs to relieve that burden. If any conclusion at all is to be drawn from the increasing popularity of little-RICOs, it is that a growing number of states perceive their own traditional remedies as inadequate.

2. Civil RICO supplements rather than supplants other federal law

Though RICO includes state offenses as predicate acts, the federal statute contemplates something more than the commission of an act, and its civil remedies as well as its criminal penalties are provided to supplement, rather than displace, those provided for in state law. As the Supreme Court stated in *United States v. Turkette*,¹²⁷ "RICO imposes no restrictions upon the criminal justice systems of the States."¹²⁸ Pointing to section 904(c) of the Organized Crime Control Act of 1970—"[n]othing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title"¹²⁹—the Court concluded that "under RICO, the States remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions."¹³⁰

Similarly, it has been suggested that RICO supplements rather than preempts the securities laws. As Michael A. Bertz stated before the Senate Judiciary Committee, "RICO was designed at least in part to deal with the prior ineffectiveness of many laws in rooting out onerous patterns of conduct. Securities laws . . . fit into this pattern of prior limited effectiveness in dealing with repetitive intentional conduct."¹³¹ In *Turkette*, the Court stated that "the very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the

126. D. Egan, *Hearings on RICO*, *supra* note 102, at 10. Consequently, among the states with no counterpart to § 1964(c) are: California, New York, Pennsylvania, Texas and Michigan—representing a considerable portion of the population of the country. If the adoption by all the states of little-RICO statutes would reduce whatever need exists for the federal statute, it would also relieve whatever burden the federal statute imposes on the federal court system.

127. 452 U.S. 576 (1981).

128. *Id.* at 586 n.9.

129. Pub. L. No. 91-452, tit. IX, § 904(c), 84 Stat. 947 (1970).

130. *Turkette*, 452 U.S. at 586 n.9.

131. *Hearings on RICO Before the Subcomm. on Oversight of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (Sept. 24, 1985) (statement of Michael A. Bertz) (official government printing not yet available; cited from text of prepared statement, at 6) (citing *Turkette*, 452 U.S. at 586) [hereinafter cited as M. Bertz, *Hearings on RICO*].

problem."¹³²

In *Herman & MacLean v. Huddleston*,¹³³ the Supreme Court noted that parallel provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 provide that "[t]he rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity."¹³⁴ Justice Marshall, writing for the majority, concluded that the "provisions confirm that the remedies in each Act were to be supplemented by 'any and all' additional remedies."¹³⁵

The additional elements which must be proven for a RICO claim, it has been argued, indicate that section 1964(c) does indeed supplement rather than preempt the securities laws:

A violation of the anti fraud provision of the Securities Exchange Act requires only one misrepresentation, whereas a RICO violation requires commission of at least two predicate acts in a "pattern" of activity. Furthermore, a Securities Exchange Act violation may result from recklessness, which is not sufficient scienter to satisfy the RICO requirement that fraud in the sale of securities involve an "offense" "punishable" under federal law.¹³⁶

As Bertz concluded, "not all securities lawsuits can or should include RICO claims."¹³⁷ The real difficulty, however, appears in deter-

132. 452 U.S. at 586.

133. 459 U.S. 375 (1983).

134. *Id.* at 383 (citing Securities Act of 1933, § 16, 15 U.S.C. § 77p (1982); Securities Exchange Act of 1934, § 28(a), 15 U.S.C. § 78bb(a) (1982)).

135. *Id.* Similarly, the ABA Criminal Justice Section, RICO Cases Committee (RICO Cases Committee) stated:

An impression is apparently widespread among the securities industry that RICO simply "overlaps" all securities fraud. This impression is mistaken. RICO says "offenses" involving "fraud in the sale of securities" "punishable under any law of the United States." 18 U.S.C. § 1961(1)(D) (1982). "Offense" means *criminal* offense. *Black's Law Dictionary* 975 (5th ed. 1979). . . . Accordingly, only the *criminal* fraud provisions of the securities acts fall within RICO. . . . Merely negligent conduct or a transaction that only operates as a fraud does not fall within the statute. See *Aaron v. SEC*, 446 U.S. 681, 701-02 (1980) (intent to defraud rather than negligence in § 10(b) of the 1934 Act, or § 17a(1) of the 1934 Act, but not untrue statements or admissions or transactions that operate as a fraud under § 17(a)(2) or (3) of the 1933 Act). Such an overlap between statutes is neither "unusual nor unfortunate." *SEC v. National Securities, Inc.*, 393 U.S. 453, 468 (1969).

RICO CASES COMMITTEE, ABA CRIMINAL JUSTICE SECTION, A COMPREHENSIVE PERSPECTIVE ON CIVIL AND CRIMINAL RICO LEGISLATION AND LITIGATION, A REPORT OF THE RICO CASES COMMITTEE 42 n.28 (1985) (emphasis in original) [hereinafter cited as COMPREHENSIVE PERSPECTIVE].

136. M. Bertz, *Hearings on RICO*, *supra* note 131, at app. A, at 8.

137. *Id.* There is some support for the view that *no* securities lawsuit should include RICO

mining which lawsuits, whether involving securities or otherwise, ought to include RICO claims. The Court in *Sedima, S.P.R.L. v. Imrex Co.*,¹³⁸ noting that "Congress wanted to reach both 'legitimate' and 'illegitimate'

claims. This is the view expressed by Edward I. O'Brien, President of the Securities Industry Association, as well as by Chairman John S.R. Shad of the SEC. See E. O'Brien, *Hearings on RICO*, *supra* note 91, at 5 ("remedies of RICO are most certainly not needed when . . . specific remedies already exist under the federal securities laws"); *Hearings on RICO Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, (Oct. 2, 1985) (statement of John S.R. Shad, Chairman, United States Sec. & Exch. Comm'n) (official government printing not yet available; cited from prepared statement, at 9) (supporting "regulated industry" exemption from civil RICO suits). However, the North American Securities Administrators, Inc., issued the following resolution:

Be it resolved that the Board of Directors of the North American Securities Administrators, Inc. ("NASAA") fully supports the concept of private rights of action under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") involving securities, mail and wire fraud, and therefore strongly supports both retention of federal securities, mail and wire fraud violations as predicate offenses, and retention of treble damages for private civil actions under RICO.

Hearings on RICO Before the Subcomm. on Oversight of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (July 31, 1985) (statement of Philip A. Feigin, Assistant Sec. Comm'r, Colo. Div. of Sec., on behalf of the N. Am. Sec. Adm'rs Ass'n) (official government printing not yet available; cited from text of prepared statement, at 3) [hereinafter cited as P. Feigin, *Hearings on RICO*].

Note that RICO affects other regulated industries as well, for example the banking industry. The Federal Deposit Insurance Corporation (FDIC) asked that bank fraud be included as a predicate offense to ensure that the FDIC can continue to expand its use of RICO's supplemental remedies. *Hearings on RICO Before the Subcomm. on Oversight of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (May 20, 1985) (statement of Daniel W. Persinger, Deputy Gen. Counsel, Federal Deposit Ins. Corp., appearing on behalf of the Fed. Deposit Ins. Corp.) (official government printing not yet available; cited from text of prepared statement, at 11) [hereinafter cited as D. Persinger, *Hearings on RICO*].

Professor Blakey, *see supra* note 20, suggested a "regulated industry exception" from civil RICO to the ABA Task Force. ABA TASK FORCE REPORT, *supra* note 10, at 268-69. Under such an exception:

[A] private Civil RICO treble damage remedy . . . would not be available in those cases where the plaintiff could seek redress of his injuries caused by the defendants' violative conduct under existing express or implied damage remedies under federal securities statutes, the federal Commodity Exchange Act, federal banking laws or other comparable laws regulating particular industries or particular classes of activities. Second, the private civil treble damage remedy would not be available in those cases arising in an industry or type of activity where there is an extensive federal regulatory scheme, but where the Congress or the courts have determined that no private damage cause of action is appropriate. . . .

There is one principal defect in attempting to achieve regulatory reform through a "regulated industry" exception approach: Why should not a treble damage remedy be available to a business entity that is infiltrated by an organized criminal group through commission of multiple mail, wire and securities fraud offenses? Just because the business entity is within the sphere of an overall federal regulatory statute, *i.e.*, the federal securities laws or the federal banking laws, why should it be unable to attack the criminal infiltration with the Civil RICO remedy?

Id. at 270-72.

138. 105 S. Ct. 3275 (1985).

enterprises,"¹³⁹ stated that the "former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."¹⁴⁰ As stated by Domenic P. Gentile:

For better or for worse, the time has come to admit that the persons who operate some of the largest institutions in our country do not possess an abundance of rectitude and from time to time employ fraudulent strategies and tactics which, because of the economic power which they wield, make street thugs pale in comparison. . . . [B]ig business does far more harm to our society as a whole than structured "criminal groups" can ever hope to do.¹⁴¹

And Philip A. Feigin, on behalf of the North American Securities Administrators Association, Inc., stated that:

Euphemisms like "commercial disputes," "commercial frauds," "garden variety frauds" and "technical violations" underscore the problem. These are sanitized phrases often used by "legitimate businesses and individuals" to distinguish their frauds from the "real" frauds perpetrated by the "real" crooks. Yet all willful fraudulent conduct has in common the elements of premeditation, planning, motivation, execution over time and injury to victims and commerce. And it is all crime.¹⁴²

One is thus reminded that the conduct for which RICO supplies its remedies is, in fact, criminal conduct, and that only criminal conduct will expose a defendant to liability. In the words of the NAAG/NDAA:

Legitimate business people, in fact, have little to fear from federal or state RICO legislation. Neither makes criminal that conduct that is not *now* already criminal under its predicate offenses. Both merely provide enhanced sanctions and new civil enforcement mechanisms. Legitimate business people do not perpetrate fraud; they are victimized by it. Good faith commercial disputes, moreover, do not constitute *criminal* fraud. Nothing in RICO provides to the contrary.¹⁴³

Similarly, Bertz concluded that "there is no need for Congress to protect

139. *Id.* at 3287 (citing *United States v. Turkette*, 452 U.S. 576, 585 (1981)).

140. *Id.* (citations omitted).

141. *Hearings on RICO Before the Subcomm. on Oversight of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (July 31, 1985) (statement of Domenic P. Gentile) (official government printing not yet available; cited from text of prepared statement, at 4-5) [hereinafter cited as D. Gentile, *Hearings on RICO*].

142. P. Feigin, *Hearings on RICO*, *supra* note 137, at 13.

143. NAAG/NDAA, *Hearings on RICO*, *supra* note 104, at 15 (emphasis in original).

the legitimate business or professional so long as that word 'legitimate' applies to the manner in which the business or profession is actually conducted, and is not merely a label reflecting an undeserved status."¹⁴⁴

3. Legitimate businesses have nothing to fear from civil RICO

Also disputed is the claim, endorsed by Justice Marshall, that, accompanied by the threat of "ruinous exposure" and a racketeering stigma, even wholly meritless RICO suits have become the vehicles of extortion of unwarranted settlements.¹⁴⁵ Indeed, the ABA survey cited by Justice Marshall as authority for this effect in reality seems to have provided little substantiation. In that survey, out of forty respondents reporting "that the client company had been threatened with a Civil RICO claim . . . [a]lmost no one thought the threats had any significant effect. Some said that a threat of a RICO claim only made the parties more intransigent because of the 'racketeer' label."¹⁴⁶

The NAAG/NDAA, while conceding that "it may be that some RICO suits have been brought by unethical plaintiff's lawyers hoping to obtain quick settlements by the filing of strike suits,"¹⁴⁷ found it

difficult to understand how Justice Marshall could believe that a suit with "no merit" faces a defendant with "ruinous exposure." If the plaintiff's suit has *no* merit, his chance of success is zero, and zero multiplied by three (or any other number) is still zero. Before this Committee accepts Justice Marshall's claim from any witness who appears before it, it ought to ask for the names of the defendants and the cases allegedly so settled. It should then inquire of the plaintiffs what their evidence was. It is doubtful that you will find that the litigation was meritless. It is doubtful, in short, that responsible corporate or other defendants are paying off strike suits in the RICO—or any other area—at more than their settlement value, no matter what the theory of the complaint is. Neither the racketeer label nor the threat of treble damages will convince prudent manag-

144. M. Bertz, *Hearings on RICO*, *supra* note 131, at 7. Indeed, the enacting Congress chose to prohibit *conduct*, rather than a status. See *supra* note 20. The term "legitimate business" is no more capable of definition than is "organized crime," and where both are engaged in the same conduct it is no more justified to seek to exempt one from the consequences of such conduct than to attempt to limit such consequences to the other.

145. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3292, 3295 (1985) (Marshall, J., dissenting in *Sedima* and *American Nat'l Bank & Trust Co. v. Haroco, Inc.*, 105 S. Ct. 3291) (citing ABA TASK FORCE REPORT, *supra* note 10, at 60).

146. ABA TASK FORCE REPORT, *supra* note 10, at 60.

147. NAAG/NDAA, *Hearings on RICO*, *supra* note 104, at 15.

ers lightly to surrender scarce resources merely because another files a suit. No matter how colorfully it is phrased, the claim that such managers act against their own interests is not credible.¹⁴⁸

Dave Frohnmayer, Attorney General of Oregon, suggested "a simple cure for their perceived fear of RICO: If there are no . . . illegal activities, there will be no RICO action."¹⁴⁹

Steven Twist, Assistant Attorney General of Arizona, pointed out that "[t]here is scant evidence that RICO has created baseless litigation in any greater proportion than other causes of action. . . . [T]here is now no empirical data that shows RICO is more abused than an 'average' cause of action."¹⁵⁰ Conceding that the abuse of RICO is an appropriate topic for congressional consideration, Twist cautioned that measures directed to the prevention of abuse "must . . . be directed to the causes of abuse, not at protecting the perpetrators whose conduct necessitates RICO in the first instance."¹⁵¹

It is unlikely that anyone will take exception to the principle that legislation be directed to the causes of abuse. The various bills and proposals examined in the next section, however, reflect the broad disagreement concerning both the causes of abuse and the identities of the perpetrators whose conduct necessitates the statute.

V. CONGRESSIONAL RESPONSE

A. The Bills

Congress is currently considering three bills, each presenting a different solution to the problems which have emerged from fifteen years of judicial construction of RICO.

H.R. 2517¹⁵² was introduced on May 15, 1985, by Congressman John Conyers, Jr.¹⁵³ The bill sets forth the following amendments to RICO:

- (1) To change RICO's title to Criminal Enterprises and

148. *Id.* at 37-38 (emphasis in original).

149. *Hearings on RICO Before the Subcomm. on Oversight of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (July 30, 1985) (statement of Dave Frohnmayer, Att'y Gen. of Or., appearing on behalf of Nat'l Ass'n of Att'ys Gen.) (official government printing not yet available; cited from text of prepared statement, exhibit, letter of June 3, 1985, at 1) [hereinafter cited as D. Frohnmayer, *Hearings on RICO*].

150. S. Twist, *Hearings on RICO*, *supra* note 122, at 14 (emphasis in original).

151. *Id.* at 19.

152. H.R. 2517, 99th Cong., 1st Sess. (1985); see *infra* Appendix B for full text of H.R. 2517.

153. Democrat, 1st dist., Mich.

Corruption of Enterprises, and to delete the word "racketeer" from the statute, substituting the word "criminal";

(2) To change the definition of "enterprise" to "a business or business-like association of persons," and specifically to include governments and government agencies. This would seemingly delete "any individual" from the present definition;

(3) To define "pattern" as:

(a) acts separate in time and place that are "interrelated by a common scheme or plan,"

(b) committed within five (instead of ten) years of an indictment or information, thereby introducing a five year statute of limitations and a prior indictment or information requirement on 18 U.S.C. § 1964,¹⁵⁴ and

(c) which acts are not both violations of the same fraud provision (excluding securities fraud);

(4) To add a requirement that a defendant "knowingly" violate section 1962 (in addition to the scienter requirements inherent in the predicate offenses); and

(5) To add a new section 1962 prohibition, against participating in a supervisory capacity in a "criminal syndicate" defined in the bill).

H.R. 2943¹⁵⁵ introduced on July 10, 1985, by Congressman Frederick C. Boucher,¹⁵⁶ includes the following amendments to section 1964(c):

(1) To impose a requirement that a civil defendant first be criminally convicted of "racketeering activity" (a predicate offense) or a violation of section 1962; and

(2) To install a one year statute of limitations, which would begin running at the time of conviction.

S. 1521,¹⁵⁷ introduced on July 29, 1985, by Senator Orrin G. Hatch,¹⁵⁸ includes the following amendments to section 1964(c):

(1) To limit section 1964(c) recovery to "competitive, investment, or other business injury";

(2) To require that one predicate offense be an offense other than mail fraud, wire fraud or securities fraud; and

154. 18 U.S.C. § 1964 (1982), 18 U.S.C.A. § 1964(b) (West Supp. 1985).

155. H.R. 2943, 99th Cong., 1st Sess. (1985); see *infra* Appendix C for full text of H.R. 2943.

156. Democrat, 9th dist., Va.

157. S. 1521, 99th Cong., 1st Sess. (1985); see *infra* Appendix D for full text of S. 1521.

158. Republican, Utah.

(3) To permit award of costs and attorney's fees to a defendant where a 1964(c) claim is "frivolous and without merit."

All these measures are aimed at curbing the perceived abuses of section 1964(c). While the "frivolous suit" provision of Senator Hatch's bill addresses only the most egregious abuses of section 1964(c) as it is now written, the other proposed provisions, if enacted, may have considerable impact on the scope and viability of the private remedy as well as other aspects of RICO. If the private civil remedy is to be amended, the impact on RICO will depend upon the resolution of the major issues which have emerged from the section 1964(c) experience. This Comment will examine the issues that are receiving the most attention in Congress. They are:

- (1) RICO-type injury;
- (2) prior conviction and burden of proof;
- (3) pattern of racketeering activity;
- (4) fraud; and
- (5) additional measures to prevent abuse.

B. The Issues

1. A RICO-type injury

S. 1521¹⁵⁹ includes an attempt to define the kind of injury addressed by RICO and to limit the scope of 18 U.S.C. § 1964(c)¹⁶⁰ to such injury. The bill would amend section 1964(c)'s provision of the treble damages remedy for "[a]ny person injured in his business or property" to allow such a remedy to "[a]ny person suffering competitive, investment, or other business injury."¹⁶¹

The amendment would not introduce that indefinable separate-from-the-predicate-acts injury favored by the court of appeals in *Sedima, S.P.R.L. v. Imrex Co.*,¹⁶² nor present a barrier to plaintiffs like *Sedima*.¹⁶³

159. See *infra* Appendix D for complete text.

160. 18 U.S.C. § 1964(c) (1982).

161. See *infra* Appendix D for complete text.

162. 741 F.2d 482 (2d Cir. 1984). "For purposes of clarity," the court identified the RICO standing requirement as a "'racketeering injury' requirement [that] carries with it . . . the obligation that the plaintiff show injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." *Id.* at 496. See the discussion of *Sedima, supra* notes 51-82 and accompanying text.

163. *Sedima*'s injury would probably be considered a business injury within the scope of S. 1521. The standing requirement proposed in S. 1521 is therefore less restrictive than either of those adopted by the *Sedima* trial court or that adopted by the court of appeals. See *supra* text accompanying notes 56-59.

In fact, the amendment proposes to eliminate from the statute only injury to property unconnected to business.

Senator Hatch's statement before the Judiciary Committee may explain his purpose in proposing the amendment:

In the wake of the Supreme Court's *Sedima* and *Horoco* rulings, . . . RICO's treble damage remedy is being used almost exclusively to bring common commercial disputes into federal courts. This has some far-reaching implications For instance, common law commercial disputes are falling almost exclusively under federal court jurisdiction; common law commercial disputes have become the basis of suits for treble damages and the shifting of attorney fees; common law commercial disputes have caused legitimate businesses to be stigmatized as "racketeers."¹⁶⁴

It is difficult to understand how the elimination of private property injuries from section 1964(c) will contribute in any significant way to the reduction of common law commercial disputes brought into federal court under RICO, since such disputes usually involve commercial litigants whose interests would be unaffected by the new provision. Depending upon whether an injury to business property is an injury to the business,¹⁶⁵ the amendment would not so much define the kind of injury as specify the persons who may sue. In short, a business may sue but a private person may not unless his injury is to an "investment." This would create the anomalous result in some cases of denying a RICO remedy to a private person while providing it for a business suffering identical injuries.

An additional effect of Senator Hatch's amendment, if adopted, would be to deny the use of 18 U.S.C. § 1964(c)¹⁶⁶ to all non-business entities including state and local governments and government agencies,

164. *Hearings on RICO Before the Subcomm. on Oversight of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (Sept. 24, 1985) (statement of Sen. Orrin B. Hatch) (official government printing not yet available; cited from text of prepared statement, at 1).

165. Justice Marshall, dissenting from the *Sedima* Court's rejection of a special injury standing requirement, explained his conclusion:

Congress intended to give to businessmen who might otherwise have had no available remedy a possible way to recover damages for competitive injury, infiltration injury, or other economic injury resulting out of, but wholly distinct from, the predicate acts. . . . Indeed, that is why Congress provided for recovery only for injury to business or property—that is, commercial injury—and not for personal physical or emotional injuries.

105 S. Ct. at 3302 (Marshall, J., dissenting).

166. 18 U.S.C. § 1964(c) (1982).

as well as to the federal government.¹⁶⁷ There is nothing in the Senator's statement to indicate that such a result is intended. Though the effect on governments' use of section 1964(c) could be easily remedied by writing their authority to sue into the statute, we would still be left with an amendment that produces an arbitrary result with little, if any, predictable benefit.

The ABA Task Force, however, distinguishes between situations in which the enterprise is the victim or instrument on the one hand and the perpetrator on the other, recommending that a standing barrier be imposed only in the first instance.¹⁶⁸ The Task Force offers this test:

- (1) Where the enterprise is the victim or instrument of the RICO violation, injury compensable under Civil RICO should be limited to competitive injury, infiltration injury, and other injury wholly distinct from that caused directly by the predicate offenses;

167. As Ohio Attorney General Anthony J. Celebrezze, Jr., stated: "S. 1521 . . . would unjustifiably remove standing to all individual victims, governmental bodies, labor unions or their members, non-profit corporations and others while limiting it exclusively to business entities." *Hearings on RICO Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (Oct. 9, 1985) (statement of Anthony J. Celebrezze, Att'y Gen. of Ohio, appearing on behalf of the Nat'l Ass'n of Att'ys Gen.) (official government printing not yet available; cited from text of prepared statement, at 7) [hereinafter cited as A. Celebrezze, *Hearings on RICO*]. Thus, the NAAG/NDAA asked:

Why should business people *alone* be given a treble damage claim against organized or white-collar offenders? That would turn RICO into a piece of special interest legislation. What about individuals injured when they are not engaged in a commercial relationship? What about consumers who are not in business, but are still participating in the marketplace? What about unions that cannot be injured "competitively," through "investment," and have no "businesses?" Unions, particularly, have been taken over by organized crime figures. Union treasuries have been victimized by embezzlement; their welfare funds have been exploited by corrupt lending practices. It was true in 1970; it is true in 1985. The protection of unions and welfare funds was a central aspect of the principal, albeit not exclusive, reason RICO was adopted in 1970. What has happened since 1970 to warrant cutting back on the scope of the original statute? Why exclude unions from the Act's protections at this late date? What, too, of union members? Why should they be excluded? What of other non-commercial entities, like charities, which have no "business?" What of governmental units? They seldom have "competition," can be "invested in" or have, strictly speaking, "a business?" Why should we exclude general injury to governmental property by criminal activities under RICO?

NAAG/NDAA, *Hearings on RICO*, *supra* note 104, at 22-23 (emphasis in original). As is the case with individuals, government entities at all levels have a strong interest in § 1964(c). See *infra* notes 274-82 and accompanying text.

But compare Arizona's little-RICO statute, which provides the treble damage remedy for "[a] person who sustains injury to his *person*, business or property by racketeering." ARIZ. REV. STAT. ANN. § 13-2314(A) (Supp. 1985) (emphasis added). As is true of the federal statute, Arizona defines "racketeering" as any act "chargeable or indictable" involving specifically enumerated offenses—that is, *criminal* conduct. *Id.* § 13-2301(D)(4).

168. ABA TASK FORCE REPORT, *supra* note 10, at 320.

(2) Where the enterprise is, under the Task Force's view of appropriate standards of derivative liability, a perpetrator of the predicate offenses, then injury compensable under Civil RICO should include competitive injury, infiltration injury, injury caused by the predicate offenses themselves, and any additional injury wholly distinct from that caused directly by the predicate offenses.¹⁶⁹

Even assuming that a definition could be formulated which would provide a practical distinction between an enterprise as instrument and an enterprise as perpetrator, the distinction makes sense only as a means to insulate innocent enterprises from RICO liability. But the distinction would also have the effect of denying to some victims the remedies afforded to other victims of identical conduct, depending solely upon the relationship of the defendant to the enterprise.

If protection of innocent enterprises (and other innocent parties) is the goal, the statutory addition to RICO of "appropriate standards of derivative liability," another measure favored by the Task Force,¹⁷⁰ would seem to be more tailored to that goal. Whether the enterprise is a victim, an instrument or a perpetrator seems less relevant to the question of what injury ought to be compensable than the question of whether the enterprise ought to be liable at all, at least so far as treble damages are concerned.

The grafting of the separate injury requirement on RICO originated by analogy to the antitrust laws.¹⁷¹ But even where the RICO injury is not limited to a competitive one, the analogy is misguided. The antitrust laws were designed to discourage conduct which necessarily manifests itself in a particular kind of injury.¹⁷² Though the mere formation of a trust may violate laws, if such a trust produces no negative effect on competition, there is no trust inflicted injury. Standing to sue *under the anti-trust laws* must be based upon the injury which those laws were expressly designed to prevent.

RICO is not focused on a particular kind of injury, but on *conduct* which can, and does, result in different kinds of injuries. It is true that RICO addresses the infiltration of an enterprise. But the statute also

169. *Id.*

170. *Id.* See *infra* notes 326-38 and accompanying text.

171. See *supra* note 41 and accompanying text.

172. A trust is defined as "[a]n association or organization of persons or corporations having the intention and power, or the tendency, to create a monopoly, control production, interfere with the free course of trade or transportation, or to fix and regulate the supply and the price of commodities." BLACK'S LAW DICTIONARY 1352 (5th ed. 1979).

addresses the *conduct* of an enterprise through racketeering activity, and the variety of offenses which constitute racketeering suggests a variety of injuries. All the injuries which result from a violation of section 1962 are appropriate for compensation under the statute.

Indeed, the separate injury requirement, as applied to RICO, can only have the anomalous effect, as the *Sedima* Court suggested, of denying a remedy to direct victims of racketeering activity while preserving it for the indirect victims.¹⁷³ Should Congress wish to limit the private civil RICO action to particular kinds of conduct, amendments should be addressed not to injuries or plaintiffs but to the conduct itself.

2. Prior conviction and burden of proof

In declining to acknowledge any constitutional barrier that might prevent 18 U.S.C. § 1964(c),¹⁷⁴ as drafted, from functioning as a private attorney general measure,¹⁷⁵ the Supreme Court has saved those who would maintain the present scope of the private remedy the relatively minor trouble of redefining "racketeering activity" to refer to criminal laws, as such.¹⁷⁶ The Court has, in effect, corrected a relatively minor defect in the statute while leaving to Congress the correction of that major defect, "if defect it is," concerning the very scope of civil RICO.¹⁷⁷

Congressman Boucher would supply that correction. H.R. 2943,¹⁷⁸ introduced nine days after the Supreme Court decided *Sedima*, would codify the court of appeals' prior conviction requirement, amending section 1964(c) to read, in pertinent part:

Any person injured in his business or property by reason of conduct in violation of section 1962 of this chapter may sue any person who engaged in that conduct and, with respect to such conduct, was convicted of racketeering activity or of a violation of section 1962 in any appropriate United States district court, and shall recover threefold the damages he sustains and the

173. 105 S. Ct. at 3286 n.15.

174. 18 U.S.C. § 1964(c) (1982).

175. See *supra* text accompanying note 19.

176. Objections to proving criminal offenses in a civil suit, see *infra* notes 192-217 and accompanying text, could be answered by removing any reference to criminal laws and defining each of the predicate acts that constitute "racketeering activity" as they are defined in the various criminal laws. While this would prevent any taint of criminal conduct from resulting from a civil suit, it would offer less protection to a defendant than does the current statute, since without a requirement that acts be "indictable or chargeable," courts would be free to let § 1964(c) suits proceed on a lesser standard.

177. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3287 (1985). See *supra* text accompanying note 82.

178. See *infra* Appendix C for complete text.

cost of the suit, including a reasonable attorney's fee.¹⁷⁹

This bill would effectively delete the private civil action from RICO. In delineating the potential implications of the court of appeals' predicate act conviction requirement, Justice White, writing for the *Sedima* Court, recognized that such a requirement would arbitrarily limit the availability of section 1964(c) actions.¹⁸⁰ The Court noted that lawbreakers are not always caught, and even where convictions have been obtained, victims would be unlikely to recover for all the acts of racketeering activity because convictions are rarely obtained for all the possible charges.¹⁸¹ Additionally, a criminal defendant might plea bargain to non-predicate-act offenses or to a portion of the charges in order to limit or avoid civil liability.¹⁸² The Court also noted that the civil litigants' dependence on successful criminal prosecution might result in private pressures on prosecutors as well as in self-serving trial testimony.¹⁸³ The Court further noted the problems that would occur when convictions were reversed on appeal, and concluded that "the compelled wait for the completion of criminal proceedings would result in pursuit of stale claims, complex statute of limitations problems, or the wasteful splitting of actions, with resultant claim and issue preclusion complications."¹⁸⁴

The bill proposed by Congressman Boucher would, if enacted, realize all the problems foreseen by the Supreme Court. By narrowing the area in which a section 1964(c) defendant must be found, H.R. 2943 would broaden the area into which a potential defendant could escape section 1964(c)'s reach.

While H.R. 2943's prior conviction requirement would answer many of the objections to RICO's breadth, it would do so by decimating the private civil remedy. For those who believe that section 1964(c) should be preserved as nothing more than a remedy for injuries sustained as a result of criminal racketeering activity, the amendment offers something of a solution. Even so, as Justice White's criticism of the prior conviction requirement suggests, its enforcement would prove arbitrary, affording relief to some injured parties while denying it to others for the sole reason that the person causing their injuries avoided the requisite racketeering conviction. Indeed, any prior conviction requirement will

179. See *infra* Appendix C for complete text.

180. 105 S. Ct. at 3282 n.9.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

have this consequence, and the more narrowly focused the requirement, the more arbitrary the result.

Perhaps as a compromise between the decimating effects of the prior conviction requirement proposed in H.R. 2943 and the unacceptable scope of section 1964(c) as it now stands, a requirement of a prior *indictment* of at least one of the predicate acts is included in H.R. 2517's narrow definition of "pattern of criminal activity."¹⁸⁵ H.R. 2517 defines "pattern of criminal activity," in part, as "two or more acts . . . each of which occurred not more than five years before the indictment is found, or information is instituted, that names such acts as predicate criminal activity."¹⁸⁶

This proposal would avoid at least some of the problematic consequences which Justice White foresaw in the prior conviction requirement. It would avoid, for example, the incentive for plea-bargaining to non-predicate-act offenses as well as the incentive for self-serving trial testimony. The proposal would also avoid the problems that arise when all or some of the convictions are reversed on appeal, since the civil liability would have long since attached.

While a prior indictment requirement would still arbitrarily deny some injured plaintiffs a RICO remedy, this effect would be less than in the case of a prior conviction requirement, since many more plaintiffs would be able to obtain a remedy. And while such a requirement would not confine section 1964(c) to proven criminal conduct, it would reduce the incidence of commercial frauds being brought within the scope of civil RICO by introducing the element of prosecutorial discretion that Justice Marshall calls "[t]he only restraining influence on the 'inexorable expansion of the mail and wire fraud statutes.'"¹⁸⁷

But the prior indictment requirement would give rise to possible constitutional problems. Imposing liability upon a defendant on the basis of a mere indictment would subject the measure to due process and equal protection challenges. To attach RICO liability to a defendant on the basis of an indictment or information would be to impose a penalty—the penalty of exposure to section 1964(c) liability—to which similarly situated but unindicted persons would not be subjected. Judge Oakes,

185. See *infra* Appendix B. H.R. 2517 deletes the word "racketeer" and substitutes "criminal" throughout the statute. For a discussion of this measure, see *infra* notes 302-11 and accompanying text.

186. H.R. 2517, *infra* Appendix B.

187. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3292, 3294 (1985) (Marshall, J., dissenting in *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 and *American Nat'l Bank & Trust Co. v. Haroco, Inc.*, 105 S. Ct. 3291) (quoting *United States v. Siegel*, 717 F.2d 9, 24 (2d Cir. 1983) (Winter, J., dissenting in part)).

writing for the court of appeals in *Sedima*, was concerned about the constitutional implications of attaching liability for criminal conduct on less than a reasonable doubt standard of proof.¹⁸⁸ The Supreme Court responded that it did "not view the statute as being so close to the constitutional edge."¹⁸⁹ The imposition of liability with no proof at all might carry the statute to that edge—and over it.¹⁹⁰

The major objection to all variations of the prior conviction or prior indictment requirement, however, remains that to whatever extent section 1964(c) furnishes a deterrent to unlawful conduct, the deterrent effect would be lost in great measure by the imposition of such a requirement. A person undeterred by RICO's severe criminal sanctions would not likely be further deterred by additional civil sanctions. The problem with the prior conviction requirement, like the separate injury requirement, is that it seeks the reduction of perceived abuses through a wholesale undirected reduction of accessibility to section 1964(c). These suggested solutions do not address the problem.¹⁹¹

The *Sedima* court of appeals imposed the prior conviction requirement in part because it believed that, since a RICO claim necessarily entails proof of criminal conduct, the higher standard of proof appropriate to criminal proceedings should be required for the predicate offenses. The court reasoned that to require different standards of proof for different elements of the cause of action would be impractical.¹⁹² This argument did not persuade the Supreme Court, however, which stated that "even if the stricter standard is applicable to a portion of the plaintiff's proof, the resulting logistical difficulties, which are accepted in other contexts, would not be so great."¹⁹³

188. See *supra* note 63 and accompanying text.

189. *Sedima*, 105 S. Ct. at 3283.

190. This would be a first impression. As Professor Blakey pointed out to the ABA Task Force, "there is no other civil remedy in Anglo-American jurisprudence that is tied to mere indictment of a criminal charge." ABA TASK FORCE REPORT, *supra* note 10, at 222 n.343 (quoting Professor Blakey). The Task Force acknowledged that "[a]ttaching such punitive civil consequences to mere indictment might well run afoul of the presumption of innocence in our legal system." *Id.*

191. In the words of the NAAG/NDAA:

Requiring a prior criminal conviction . . . would castrate the civil remedies available . . . under RICO. Indeed, that is the not-too-well-hidden purpose of those who recommend the criminal conviction limitation. It would turn RICO's promise of remedial relief for victims of crime into a sham, Congress ought not to be a party to that kind of legislative fraud.

NAAG/NDAA, *Hearings on RICO*, *supra* note 104, at 57.

192. *Sedima*, S.P.R.L. v. Imrex Co., 741 F.2d 482, 501-02 (2d Cir. 1984), *aff'd*, 105 S. Ct. 3275 (1985).

193. 105 S. Ct. at 3283. The Court did not furnish examples. For contexts in which a

Nor did the court of appeals' argument persuade the ABA Task Force, which has recommended that RICO be amended to require a reasonable doubt standard for proof of the commission of the predicate offenses.¹⁹⁴ Stating that "while private actions exist under other statutes, e.g., the antitrust laws, which have parallel criminal provisions, none of these statutes requires that as a prerequisite for recovery the plaintiff must prove that crimes were committed by the defendants,"¹⁹⁵ the ABA Task Force found that RICO's "particularly stringent and onerous remedies"¹⁹⁶ and "racketeer" stigma justify a "standard of proof more strict than mere preponderance."¹⁹⁷ Noting actions in which juries determine the existence of fraud by clear and convincing evidence and other elements of the claim by a preponderance,¹⁹⁸ the ABA Task Force concluded by recommending that RICO be amended to require that the predicate offenses be proved beyond a reasonable doubt as a prerequisite to recovery under its civil provisions.¹⁹⁹

The ABA Task Force's argument for a higher standard than a preponderance, however, did not explain how it arrived at a reasonable doubt standard. The RICO Cases Committee, agreeing that civil RICO's "drastic injunctive remedies, treble damages, and attorneys' fees" warrant a higher standard of proof than a preponderance, nonetheless felt that "since the civil suits did not threaten loss of life, incarceration, or conviction of a crime," a reasonable doubt standard is "too severe."²⁰⁰ A minority of the RICO Cases Committee concurred, finding no justification for the reasonable doubt standard in civil RICO cases.²⁰¹ The RICO Cases Committee stated that the reasonable doubt standard "should be confined to the limited occasions that gave rise to it."²⁰² Accordingly,

higher standard of proof is applied to particular elements of a civil action, see *infra* notes 202-03.

194. ABA TASK FORCE REPORT, *supra* note 10, at 384.

195. *Id.* at 381 n.621.

196. *Id.* at 382.

197. *Id.* at 382-83.

198. *Id.* at 383-84.

199. *Id.* at 384. See *infra* notes 201-03.

200. COMPREHENSIVE PERSPECTIVE, *supra* note 136, at 110-11.

201. *Id.* at 113.

202. *Id.* (citing 9 J. WIGMORE, EVIDENCE § 2498, at 327 (3d ed. 1942) ("Policy suggests that . . . [it] should be strictly confined to its original field and that there ought to be no attempt to employ it in any civil case.")).

"It is sometimes said that, in general, *whenever* in a civil case a *criminal act is charged* as a part of the case, the rule for criminal cases [*i.e.*, a reasonable doubt] should apply; but this has been generally repudiated." 9 J. WIGMORE, EVIDENCE § 2498, at 422 (Chadbourn rev. ed. 1981) (emphasis in original); see also cases cited *id.* § 2498, at 422-24 nn.2-12.

The Supreme Court declined to require a reasonable doubt standard to establish the obscenity of a motion picture in a nuisance abatement action, declaring that "the Court has never

the RICO Cases Committee recommended a "clear and convincing"

required the 'beyond a reasonable doubt' standard to be applied in a civil case." *California v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90, 93 (1981). Justice Stevens pointed out, however, that the Court has "used the standard in several civil contexts." *Id.* at 97 n.5 (Stevens, J., dissenting). These statements are not necessarily contradictory.

It is true that the Court has found the reasonable doubt standard appropriate in very particular civil contexts. In *Moore v. Crawford*, 130 U.S. 122 (1888), the Court upheld application of a reasonable doubt standard to the invalidation of a land title by evidence of an oral agreement. *Id.* at 134. The Court stated that "[I]t is only when an oral agreement is clearly and satisfactorily proven by testimony above suspicion and beyond reasonable doubt, that it will be enforced to establish rights in land at variance with the muniments of title. . . ." *Id.* In *Ward & Gow v. Krinsky*, 259 U.S. 503 (1922), the Court upheld a workers' compensation law against an equal protection claim, ruling that the general presumption "that a legislature understands and correctly appreciates the needs of its own people" can only be overcome where it is demonstrated beyond a reasonable doubt that the formulation chosen by the legislature bears no relation to a legitimate interest. *Id.* at 521-22. In *Radio Corp. of Am. v. Radio Eng. Laboratories, Inc.*, 293 U.S. 1 (1934), the Court stated that "'the presumption of the validity of the patent is such that the defense of invention by another must be established by the clearest proof—perhaps beyond reasonable doubt.'" *Id.* at 8 (quoting *Austin Machinery Co. v. Buckeye Traction Ditcher Co.*, 13 F.2d 697, 700 (1926)). But the Court continued: "Through all the verbal variances, however, there runs this common core of thought and truth, that one otherwise an infringer who assails the validity of a patent fair upon its face bears a heavy burden of persuasion, and fails unless his evidence has more than a dubious preponderance." *Id.*

More recently, the Court ruled that due process requires a reasonable doubt standard during the adjudication stage of delinquency proceedings when a juvenile is charged with acts that would constitute a crime if committed by an adult, just as it does in a criminal proceeding against an adult. *In re Winship*, 397 U.S. 358, 368 (1969). The Court reasoned that:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

Id. at 363-64. But in *Addington v. Texas*, 441 U.S. 418 (1979), an undivided Court refused to require a reasonable doubt in a *civil* commitment proceeding, stating that:

There are significant reasons why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions. In a civil commitment state power is not exercised in a punitive sense. Unlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution. Cf. [*Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276, 284-85 (1966)].

In addition, the "beyond a reasonable doubt" standard historically has been reserved for criminal cases. This unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the "moral force of the criminal law," *In re Winship*, 397 U.S. at 364, and we should hesitate to apply it too broadly or casually in noncriminal cases.

Addington, 441 U.S. at 428.

In general, the reasonable doubt standard has been rejected in cases involving a statutory penalty, a plea of truth to an action for a defamatory charge of crime, a plea of arson by the insurer in an action on a fire insurance policy, disbarment proceedings, a paternity suit, a proceeding for divorce or alienation of affections on the ground of adultery, and contempt

standard as striking "an appropriate balance, protecting the rights of civil defendants while allowing plaintiffs with strong proof of violations successfully to prosecute their claims."²⁰³

proceedings. 9 J. WIGMORE, EVIDENCE § 2498, at 422-24 (Chadbourn rev. ed. 1981), see cases cited *id.* at 422-24 nn.4-12.

In civil RICO cases, the preponderance standard has been applied. In *United States v. Cappelto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), the court declined to require a reasonable doubt standard for a civil injunction suit brought by the United States under RICO's § 1964(a). *Id.* at 1356-57. The court found that:

[A]cts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings, and the prosecuting arm of the government may be authorized to elect whether to bring a civil or criminal action, or both. A civil proceeding to enjoin those acts is not rendered criminal in character by the fact that the acts also are punishable as crimes.

Id. at 1357. The court noted other statutes in which "Congress has provided alternative civil and criminal remedies . . ." concluding that "the standard of proof is lower in a civil proceeding than it is in a criminal proceeding under any of the statutes we are considering." *Id.* Until the court of appeals' decision in *Sedima*, every court that dealt with the issue rejected the reasonable doubt standard for RICO civil actions. ABA TASK FORCE REPORT, *supra* note 10, at 380. See, e.g., *Eaby v. Richmond*, 561 F. Supp. 131, 133-34 (E.D. Pa. 1983); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 675-77 (N.D. Ind. 1982); *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978).

203. COMPREHENSIVE PERSPECTIVE, *supra* note 136, at 110-11. In *Herman & McClean v. Huddleston*, 459 U.S. 375 (1983), the Court applied a preponderance standard to a civil case involving allegations of securities fraud. *Id.* at 390-91. The Court found "the traditional use of a higher burden of proof in civil fraud actions at common law" of "questionable pertinence." *Id.* at 388. The Court reasoned that:

A higher standard of proof apparently arose in courts of equity when the chancellor faced claims that were unenforceable at law because of the Statute of Wills, the Statute of Frauds, or the parol evidence rule. Concerned that claims would be fabricated, the chancery courts imposed a more demanding standard of proof. The higher standard subsequently received wide acceptance in equity proceedings to set aside presumptively valid written instruments on account of fraud. . . . Maxwell Land-Grant Case, 121 U.S. 325, 381 (1887) ("We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."). Such proceedings bear little relationship to modern lawsuits under the federal securities laws.

Id. at 388 n.27 (citations omitted). Such proceedings bear equally little relationship to civil RICO suits. The clear and convincing standard has been applied at common law in cases involving a fraudulent pension application, a fraudulent patent, a false entry of homestead land, rescission of an assignment, fraudulent inducement of an employment contract, income tax fraud, election fraud, rescission of a deed or land contract, a fraudulent conveyance, fraud in a marital property settlement, fraudulent representations in a salesman's contract, a fraudulent deed of trust, fraud in obtaining release of an insurer, fraud in a sale and a note obtained by fraud. See 9 J. WIGMORE, EVIDENCE § 2498, at 424-25 n.13 (Chadbourn rev. ed. 1981). The higher standard has also been used in cases involving allegations of undue influence, the existence of a lost deed or will, a parol gift or agreement to devise or adopt, mutual mistake sufficient for reformation of an instrument, a parol trust, an oral contract as a basis for specific performance, a forged notary's certificate and the prior anticipatory use of an invention. See *id.* § 2498, at 424-30. The higher standard of proof seems appropriate chiefly in cases where

A RICO Cases Committee minority, however, argued for retention of the preponderance standard.²⁰⁴ The minority noted federal and state holdings that “[e]ven imposition of severe sanctions, including civil penalties, may be . . . properly imposed on a showing of only a preponderance” and the fact that “the underlying conduct may also be subject to criminal sanctions ought not to make a difference.”²⁰⁵

Pointing out that “[c]ivil RICO is explicitly remedial, not penal,”²⁰⁶ the NAAG/NDAA also concluded that a preponderance standard is appropriate:

When the purpose of a statute is penal and life and liberty interests are at stake, then the proof required for the government to prevail must be beyond a reasonable doubt. When the interests in issue are primarily pecuniary, then the higher standard is not demanded, and the risk of error should be shared by the parties.²⁰⁷

In *Herman & MacLean v. Huddleston*,²⁰⁸ the Supreme Court recognized that a clear and convincing standard may be appropriate “where particularly important individual interests or rights are at stake.”²⁰⁹ The Court provided as examples cases involving termination of parental rights, involuntary commitment and deportation, stating that “[b]y contrast, imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence.”²¹⁰ Thus, the NAAG/NDAA argued that the clear and convincing standard is appropriate where “more than a pecuniary interest” is at stake—an interest bordering “on the vitality of life and liberty interests.”²¹¹ The pecuniary interests implicated by section 1964(c), together with the potential racketeer stigma, do not, in the view of the NAAG/NDAA, “border on this vitality.”²¹² The NAAG/NDAA added that “[f]or those parties fitting the definition of ‘racketeer,’ the legal label can be no more stigmatizing than that of ‘killer’ for the defendant liable in a

the plaintiff seeks to overcome the evidence of a written instrument. This traditional use of the higher standard in civil cases does not argue very persuasively for a higher standard applied to civil RICO cases generally.

204. COMPREHENSIVE PERSPECTIVE, *supra* note 136, at 111-13.

205. *Id.* at 112.

206. NAAG/NDAA, *Hearings on RICO*, *supra* note 94, at 60.

207. *Id.*

208. 459 U.S. 375 (1982).

209. *Id.* at 389.

210. *Id.* at 389-90.

211. NAAG/NDAA, *Hearings on RICO*, *supra* note 104, at 63.

212. *Id.*

wrongful death suit.”²¹³

The *MacLean* Court upheld a preponderance standard in a civil case alleging securities fraud,²¹⁴ stating that such a standard permits the parties to “share the risk of error in roughly equal fashion.”²¹⁵ The Court reasoned that “[a]ny other standard expresses a preference for one side’s interests.”²¹⁶ Thus the NAAG/NDAA concluded that:

Despite the “risk of opprobrium that may result from a finding of fraudulent conduct,” which a defendant faced, the [*MacLean*] Court chose not to express a preference for either side. Nor should this Committee. Between an alleged “RICO perpetrator” and an alleged “RICO victim” how can Congress put its thumb on the scales of justice in favor of the perpetrator?²¹⁷

The defendant is not a “perpetrator,” however, until he has been proved so by the appropriate standard of proof. One might as easily argue that the reasonable doubt standard in criminal proceedings tips the scales in favor of the “criminal,” and quite heavily at that. The burden of proof does not so much express a preference for one side or the other, as it protects the party charged from injustice.

Additionally, even a preponderance standard tips the scales because, in a tie, judgment favors the party who does not have to carry the burden of proof. It might be said that wherever one party has the burden, the law is expressing a preference for the interests of the other side. It is not a question, then, of *whether* the scales ought to be tipped, but a question of *how much*.

It may be appropriate for Congress to consider whether the interests at stake in a section 1964(c) suit do, in fact, justify a higher burden of proof for some elements of a RICO action. But in consideration of the logistical difficulties of a variable standard and the extraordinary nature of a standard higher than a preponderance in a civil suit, the evidence favoring such a change should be clear and convincing.

3. Pattern of racketeering activity

Mere racketeering activity, as defined in 18 U.S.C. § 1961,²¹⁸ will not give rise to RICO liability unless the racketeering acts are part of a

213. *Id.*

214. 459 U.S. at 387-91.

215. *Id.* at 390 (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

216. *Id.*

217. NAAG/NDAA, *Hearings on RICO*, *supra* note 104, at 62.

218. 18 U.S.C. § 1961 (1982), 18 U.S.C.A. § 1961(1) (West Supp. 1985).

"pattern." Section 1961(5) states that a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."²¹⁹

The courts have not always agreed on the meaning of "pattern." Some courts have held that the "racketeering acts must have been connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts."²²⁰ Yet other courts have held that the "statutory definition of pattern of racketeering activity is unambiguous and contains no reference to any requirement of 'relatedness,' " so long as the acts are connected to the conduct of an enterprise.²²¹

The Supreme Court was not directly presented with the pattern question in *Sedima* and therefore did not decide the issue. The Court strongly suggested in dictum, however, that two isolated acts "may not be sufficient" to constitute a pattern.²²² Relying on legislative history it had dismissed in another context,²²³ the Court stated that:

The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."²²⁴

219. 18 U.S.C. § 1961(5) (1982).

220. *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973).

221. *United States v. DePalma*, 461 F. Supp. 778, 782 (S.D.N.Y. 1978).

222. *Sedima*, 105 S. Ct. at 3285 n.14.

223. See *supra* text accompanying notes 64-66.

224. *Id.* (quoting S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) and 18 U.S.C. § 3575(e) (1985)) (emphasis added by Court). Section 3575, "Increased sentence for dangerous special offenders," was enacted as Title X of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 992, of which RICO was Title IX. See *supra* note 5. The *Sedima* Court suggested, therefore, that the "pattern" definition contained in section 3575(e) "may be useful in interpreting other sections of the Act." 105 S. Ct. at 3285 n.14. The definition focuses on the "relationship" of the Acts to each other ("same or similar purposes, results," etc., and "not

This suggestion stands in direct contrast to the Court's earlier statement in *United States v. Turkette*²²⁵ that a pattern "is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise."²²⁶

Thus, while the Court has dealt unequivocally with the standing and conviction requirements, it has not done so with the "pattern of racketeering activity." Unless Congress can provide a functional definition, the definition of "pattern" may well become the battleground on which new judicial wars over the scope of RICO are fought.²²⁷

isolated events"). *Id.* But the means of establishing a relationship are so broad, including "same or similar . . . participants," that they exclude nothing. And in the event that anything is omitted, a relationship can be established if the acts are "otherwise interrelated by distinguishing characteristics." *Id.* If the "pattern" definition is to become the means of focusing RICO on ongoing criminality, the "continuity" element must be emphasized.

225. 452 U.S. 576 (1981).

226. *Id.* at 583.

227. Three recent decisions from the Northern District of Illinois may indicate what is in store. The first extensive post-*Sedima* analysis of the pattern requirement appears in Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828 (N.D. Ill. 1985). In *Inryco*, Judge Shadur, relying on the pattern dicta of *Sedima*'s footnote 14, see *supra* text accompanying notes 222-23, declined to follow Seventh Circuit decisions that had held acts in furtherance of a single criminal end sufficiently related to satisfy the "pattern" requirement. *Inryco*, 615 F. Supp. at 831-33 (citing *United States v. Starnes*, 644 F.2d 673, 677-78 (7th Cir. 1981); *United States v. Weatherspoon*, 581 F.2d 595, 601-02 (7th Cir. 1978)). The *Inryco* court reasoned that:

True enough, "pattern" connotes similarity, hence the cases' proper emphasis on relatedness of the constituent acts. But "pattern" also connotes a multiplicity of events: Surely the continuity inherent in the term presumes repeated criminal *activity*, not merely repeated *acts* to carry out the *same* criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."

615 F. Supp. at 831 (emphasis in original). Thus, Judge Shadur concluded that a "single scheme does not appear to represent the necessary 'pattern of racketeering activity.'" *Id.* at 833.

In *Trak Microcomputer Corp. v. Wearne Bros.*, No. 84-C-7970, (N.D. Ill. Oct. 28, 1985) (available on WESTLAW, Feb. 20, 1986, DCT database), Chief Judge McGarr disagreed with Judge Shadur's conclusion that a pattern requires acts in furtherance of more than a single scheme:

In determining the meaning of a pattern of racketeering activity, this court is bound to the language of the RICO statute. That act defines what a racketeering activity is. The act does not suggest that a pattern of racketeering activity means a pattern of fraudulent schemes; it merely requires a pattern of racketeering activity. [*Sedima*] does not compel a contrary interpretation. Nothing in the language of *Sedima* suggests that in order to find a pattern of racketeering activity, a pattern of fraudulent schemes must be pled. Rather, [*Sedima*] only requires that the racketeering activity be continuous and related.

Id. The court went on to rule that several acts of mail and wire fraud that "were related to one another in furtherance of the alleged fraudulent scheme . . . satisfy the continuity plus relationship standard of *Sedima*." *Id.*

In *Graham v. Slaughter*, No. 84-C-7881, (N.D. Ill. Nov. 27, 1985) (available on WESTLAW, Feb. 20, 1986, DCT database), Judge Getzendanner disagreed with both deci-

The ease with which a pattern of racketeering activity might be alleged in courts that require no more than the commission of two predicate acts has doubtless contributed, for good or ill, to RICO's expansive application. Indeed, the *Sedima* Court has stated that the "uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern.'" ²²⁸ If anything, the courts deciding RICO issues have developed an overabundance of meaningful concepts. By developing a more precise definition, the Ninety-ninth Congress may produce a RICO statute that will function compatibly with its own legislative intent. Equally important, it may reduce the confusion over RICO's terms that has allowed the accessibility of section 1964(c) to depend upon the interpretation preferred by a particular jurisdiction or court.

Of the three bills currently being considered, only H.R. 2517 addresses the "pattern" issue. The bill would amend section 1961(5) to read, in part:

(5) "pattern of criminal activity" means two or more acts of predicate criminal activity, separate in time and place—

. . . .

(C) that are interrelated by a common scheme, plan, or motive, and are not isolated events ²²⁹

sions. Noting that *Inryco's* apparent conclusion that multiple mailings in furtherance of a single fraudulent scheme can never constitute a pattern of racketeering activity was rejected in *Trak Microcomputer*, Judge Getzendanner stated that:

[This] court nonetheless agrees with Judge Shadur's analysis in [*Inryco*] that the term "pattern" connotes not only a relatedness but a multiplicity of events: . . . Where this court differs with [*Inryco*] is in the implication that a single fraudulent effort or episode should be equated with a single scheme. . . .

To be "continuous," more than sporadic or isolated activity must be alleged. In this court's view, that requires *more than a single transaction but not necessarily more than a single scheme*. . . . In other words, while a RICO claim must involve different criminal episodes, i.e., transactions "somewhat separated in time and place," [quoting *United States v. Moeller*, 402 F. Supp. 49, 57 (D. Conn. 1975)] an open-ended scheme may include a sufficient number of independent criminal episodes to satisfy the "continuity" factor of [*Sedima*].

Id. at 12-13 (emphasis added).

228. 105 S. Ct. at 3287 (emphasis added).

229. H.R. 2517, § 1961(5), 99th Cong., 1st Sess. (1985). For complete text of H.R. 2517, see *infra* Appendix B. H.R. 2517 substitutes the word "criminal" for "racketeer" throughout the statute. RICO thus becomes CECE (Criminal Enterprises and Corruption of Enterprises). This change also appears in the Model State Legislation of the ABA RICO Cases Committee: See *infra* notes 240-43 and accompanying text. For a discussion of CECE, see *infra* notes 302-11 and accompanying text.

Another proposed change shared by H.R. 2517 and the Model Legislation is the substitu-

The "separate in time and place" language is apparently derived from *United States v. Moeller*.²³⁰ In *Moeller*, the defendant was charged with a criminal RICO violation stemming from predicate acts of arson and kidnapping, both of which occurred on the same day at the same business plant.²³¹ The court was bound by precedent to rule that the allegations made out a "pattern of racketeering activity."²³² But the court stated:

Were the question open, I would have seriously doubted whether the word "pattern" as used in § 1962(c) should be construed to mean two acts occurring at the same place on the same day in the course of the same criminal episode. While the statutory definition makes clear that a pattern can consist of only two acts, I would have thought the common sense interpretation of the word "pattern" implies acts occurring in *different criminal episodes*, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity.²³³

Despite the court's ruling, the decision has been cited for the proposition that a "RICO claim must involve different criminal episodes, i.e., transactions, 'somewhat separated in time and place.'"²³⁴

Separation "in time and place" would provide an easy test for the facts in *Moeller*. But the absolute requirement stated in H.R. 2517, particularly with respect to *separation in place*, might provide unwanted immunity for some violators. It is conceivable that a single enterprise could be conducted through a continuous series of acts constituting racketeer-

tion of the phrase "means two or more" for RICO's "requires at least two" in the definition of "pattern of racketeering/criminal activity." The new phrasing will clarify the definition by ensuring that two acts which meet the other requirements in the definition will always be sufficient to constitute a pattern. This answers the uncertainty expressed in *Sedima* about the current definition:

As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "requires at least two acts of racketeering activity," § 1961(5) . . . , not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient.

105 S. Ct. at 3285 n.14 (emphasis added by Court). To the extent that the goals are clarity and consistency of application, this much of H.R. 2517's definition ought to be adopted into whatever definition of pattern emerges from the 99th Congress.

230. 402 F. Supp. 49 (D. Conn. 1975).

231. *Id.* at 57.

232. *Id.* at 58 (citing *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975)).

233. *Id.* at 57 (emphasis in original).

234. *Graham v. Slaughter*, No. 84-C-7881, (N.D. Ill. Nov. 27, 1985) (quoting *Moeller*, 402 F. Supp. at 58) (available Feb. 20, 1986, on WESTLAW, DCT database). See *supra* note 227.

ing activity under RICO in every respect except that, because the acts occur at the place of business of the enterprise, they are not separate in time *and place*. Separation in place creates a wholly arbitrary distinction, and while separation in time may distinguish a "pattern" from an isolated act, it does little, if anything, to narrow the meaning of "pattern."

The "common scheme" language is derived from the "pattern" definition employed in *United States v. Stofsky*.²³⁵ In *Stofsky*, the defendant was charged with violating section 1962 by committing several misdemeanor violations of the Taft-Hartley Act²³⁶ during a period of a year and a half.²³⁷ The court believed that RICO's severe criminal sanctions were not meant to be applied in circumstances involving isolated violations, and ruled that a "pattern" requires acts interrelated by a "common scheme, plan or motive."²³⁸

But a common scheme requirement may defeat the "continuity of activity" element of the pattern requirement by limiting a pattern to a single scheme. As one post-*Sedima* court stated, in refusing to recognize a pattern of racketeering activity in several fraudulent mailings to further a single scheme, "[i]t merits observing that even if the three added kick-back payments . . . involved the use of the mails, they still implemented the *same* fraudulent scheme as the first two mailings—and the single scheme does not appear to represent the necessary 'pattern of racketeering activity.'"²³⁹

235. 409 F. Supp. 609 (S.D.N.Y. 1973).

236. Labor Management Relations (Taft-Hartley) Act of 1977, Pub. L. No. 80-101, 61 STAT. 136 (codified as amended in scattered sections of 29 U.S.C.).

237. *Stofsky*, 409 F. Supp. at 614.

238. *Id.*

239. Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828, 833 (N.D. Ill. 1985) (emphasis in original); see *supra* note 227.

Black's Law Dictionary defines a "scheme" as:

A design or plan formed to accomplish some purpose; a system. *Snider v. Leatherwood*, Tex. Civ. App., 49 S.W.2d 1107, 1110 [1932]. When used in a bad sense, term corresponds with "trick" or "fraud". "Scheme to defraud" within meaning of mail fraud statute is the intentional use of false or fraudulent representations for the purpose of gaining a valuable undue advantage of working some injury to something of value held by another. *U.S. v. Mandel*, D.C. Md., 415 F. Supp. 997, 1005 [1976]. Plan reasonably calculated to deceive persons of ordinary prudence and comprehension. *U.S. v. Goldman*, 439 F. Supp. 337, 343 [1977].

BLACK'S LAW DICTIONARY 1206 (5th ed. 1979). The fact that a "pattern of racketeering activity" may include acts within ten years of each other suggests that more than a single scheme is contemplated. It would seem a rare "scheme to defraud," for example, that would endure for so long a period. The only reasonable justification for the "pattern" requirement is to encompass within RICO perpetrators engaged in a multiplicity of schemes—that is, in continuity of activity.

Additionally, the "common motive" element of the *Stofsky* definition renders the defini-

The requirement of a relation between the acts was rejected by the RICO Cases Committee,²⁴⁰ which stated:

Confining the statute's application to those patterns where a direct relationship existed between each of the predicate offenses would limit the application of RICO to a single offenses pattern, including a narrow range of cognate or subservient offenses. For example, it might only be possible to combine into a single pattern drug offenses and violent or corruption offenses, where the violence or corruption was used to advance the drug activity. The committee felt that confining the statute in this fashion would be unwise. Modern criminal organizations that are, in effect, conglomerates of crime involve in a wide range of offenses; they should not be beyond the reach of the statute.²⁴¹

In fact, the relationship of the acts to the actor should be sufficient to supply the "relationship" element of a "pattern" without requiring the acts to be related to each other. If a person continuously engages in similar conduct, a pattern emerges.

The time and place concept is found in the Model State RICO Legislation (Model Legislation)²⁴² prepared by the RICO Cases Committee. The Model Legislation defines a pattern as:

- (j) "Pattern of criminal activity" means two or more occasions of conduct
 - (1) that:
 - (i) constitute criminal activity;
 - (ii) are related to the affairs of the enterprise;
 - (iii) are not isolated; and
 - (iv) are not so closely related to each other and connected in point of time and place that they constitute a single event.²⁴³

The Model Legislation proposal would not prevent acts which occur in the same place from constituting a pattern. Depending upon a court's construction of "so closely related" and "so . . . connected in point of time and place," it is possible that this portion of the definition would do little more than prevent a single occurrence involving multiple violations

tion wholly useless, at least in respect to economic crimes. Since such crimes share the common motive of economic gain, nothing would be excluded by the definition.

240. COMPREHENSIVE PERSPECTIVE, *supra* note 120, at 36-37.

241. *Id.*

242. *Id.* at 16-178.

243. *Id.* at 29.

from constituting a pattern. "Occurrences of conduct that . . . are not so closely related to each other and connected in point of time and place that they constitute a single event" are, more simply stated, acts that *are not so closely related to each other that they constitute a single event*. The additional language is unnecessarily confusing surplusage.

The RICO Cases Committee also decided, as stated in the commentary, "to codify . . . that aspect of federal decisional law that holds that the predicate offenses in a pattern of racketeering activity need only be related to the enterprise and not to each other."²⁴⁴ But a relation "to the affairs of the enterprise" is meaningless when read in light of the Model Legislation's other provisions, particularly subparagraphs 6(b) and 6(c)(1),²⁴⁵ the Model Legislation's equivalent to RICO's subsections 1962(a) and 1962(b).²⁴⁶ Subparagraphs (b) and (c) of the Model Legislation's paragraph 6 provide, in pertinent part:

(b) It is unlawful for any person, through a pattern of criminal activity, to acquire or maintain, directly or indirectly, any interest in, or control of, any enterprise or real property.

(c)(1) It is unlawful for any person who has received any proceeds derived, directly or indirectly, from a pattern of criminal activity in which he participated as a principal, to use or invest, directly or indirectly, any part of the proceeds, or any proceeds derived from the investment or use of any of those proceeds, in the acquisition of any title to, or any right, interest, or equity in, real property, or in the establishment or operation of any enterprise.²⁴⁷

Under these subparagraphs, to the affairs of what enterprise must the pattern of criminal activity be related? Criminal activity, or racketeering activity in RICO, does not require an "enterprise." Only a pattern of such activity used in conducting the affairs of or acquiring an interest in an enterprise²⁴⁸ gives rise to RICO liability. But the criminal or racketeering activity itself, to say nothing of the pattern, need not be related to the affairs of the enterprise in which the interest is being acquired. This

244. *Id.* at 36.

245. *Id.* at 64-65.

246. See *supra* note 12 for text of § 1962.

247. COMPREHENSIVE PERSPECTIVE, *supra* note 120, at 364-65.

248. In the Model Legislation definition, an "enterprise" includes any individual, *sole proprietorship*, partnership, corporation, *trust*, or other legal entity, or any union, association, or group of persons, associated in fact although not a legal entity, *and includes illicit as well as licit enterprises and governmental as well as other entities*.

Model Legislation ¶ 5(h), COMPREHENSIVE PERSPECTIVE, *supra* note 135, at 29 (emphasis added). For the RICO definition of enterprise, § 1961(4), see *supra* note 12.

is particularly so in a violation of subparagraph (c)(1), where proceeds from criminal activity are used to acquire an interest in the enterprise. Surely the criminal activity contemplated by this subparagraph may be entirely unrelated to the affairs of the enterprise in which the interest is being acquired.

Alternatively, would the Model Legislation require proof that the pattern of criminal activity that results in the acquisition of an interest in one enterprise be related to the affairs of another enterprise? The commentary offers no explanation for such a requirement, if that is what is intended. The use of the phrase "*the* enterprise" suggests that only one enterprise is contemplated, and that enterprise is the enterprise with respect to which the violations are defined in paragraph 6. In subparagraphs 6(b) and 6(c)(1) or subsections 1962(a) and 1962(b), that enterprise would be the enterprise invested in or acquired. For actions involving these subparagraphs or subsections, the courts would be faced with a brand new construction problem.

The problem arises because the enterprise requirement is incorporated in the definition of "pattern" though it is really a separate item. In fact, the relationship that a "pattern of racketeering/criminal activity" must have to an enterprise in order to constitute a violation of the statute is defined in the Model Legislation's paragraph 6 and RICO's section 1962. Repeating the enterprise requirement in the definition of "pattern" adds nothing that is not already in paragraph 6 and section 1962 except, perhaps, confusion.²⁴⁹

The NAAG/NDAA has offered a model statute of its own, which includes a definition of pattern similar to that contained in the Model Legislation. It would add to the current definition in section 1961(5) the following language defining a pattern as two acts that:

- (A) are related to the affairs of enterprise [sic],
- (B) are not isolated; and
- (C) are not so closely related to each other and connected in point of time and place that, while having multiple bases of jurisdiction, including use of the mails, wire communications, or interstate travel or transportation, they constitute a single transaction involving only one victim not evincing continuity of

249. Ohio's little-RICO statute contains the following: " 'PATTERN OF CORRUPT ACTIVITY' MEANS TWO OR MORE INCIDENTS OF CORRUPT ACTIVITY . . . THAT ARE RELATED TO THE AFFAIRS OF *THE SAME ENTERPRISE* . . . " Act eff. Jan. 1, 1976, file 58, § 2923.31(E), 1985 Ohio Legis. Bull. 1227-34 (Anderson) (to be codified at OHIO REV. CODE ANN. § 2923.32(E) (emphasis added)). This language would work with § 1962(a)-(b), but would create the requirement of a second enterprise to which the racketeering activity must be unrelated where the activity is not related to the affairs of the victimized enterprise.

activity.²⁵⁰

It appears that what is intended by the NAAG/NDAA definition is two acts, related to "the affairs of [the] enterprise,"²⁵¹ that "are not isolated [and] are not so closely related to each other [that] they constitute a single transaction." The phrase "so . . . connected in point of time and place," as in the Model Legislation definition, is surplusage and harmless enough, though it provides an unwelcome opportunity for judges to lose the meaning of the statute in the process of construction. The "enterprise" element is also identical to that in the Model Legislation definition, and is equally meaningless in its context. The remainder of the language in this provision is sufficiently ambiguous to keep the federal judiciary busy interpreting RICO for yet another fifteen years.

The phrase "while having multiple bases of jurisdiction, including use of the mails, wire communications, or interstate travel or transportation" may be interpreted two ways. It may mean that two of these offenses will not constitute a pattern if they are so closely related that they are part of a single transaction. Alternatively, since the phrase modifies "acts," it may be interpreted as a *requirement* of "multiple bases of jurisdiction" including at least one of the listed offenses. Obviously, the former is intended,²⁵² in which case the language adds nothing at all to the suggested definition, which already calls for more than a single transaction.

By finding no pattern where the acts constitute "a single transaction involving only one victim not evincing continuity of activity," the door is left open for acts constituting *a single transaction involving more than one victim but not evincing continuity* as well as *a single transaction involving only one victim evincing continuity of activity*. Indeed, it may be difficult to conceive of a single transaction involving only one victim evincing continuity of activity. More troublesome is the "only one victim" language, because a single transaction not evincing continuity but involving more than one victim, such as partners or husband and wife, is perfectly conceivable. This situation would *always* constitute a pattern under the definition, because *only transactions involving single victims are excluded*.

250. NAAG/NDAA, *Hearings on RICO*, *supra* note 104, exhibit E, at 2.

251. The phrase "affairs of enterprise" would make an interesting subject for interpretation, but is probably the result of a typographical error. It is likely that "the enterprise," as in the Model Legislation, *see supra* text accompanying note 243, or "an enterprise" is intended.

252. While there is considerable support for a "fraud plus" requirement that at least one predicate act in a pattern of racketeering activity be an offense other than a fraud offense, *see infra* notes 266-72 and accompanying text, this would be the first time anyone has proposed that *at least* one predicate act be a fraud offense. The NAAG/NDAA opposes the "fraud plus" requirement. NAAG/NDAA, *Hearings on RICO*, *supra* note 104, at 8.

No reason for such a distinction has been advanced by anyone, nor is it likely that such a result is intended here.²⁵³

The NAAG/NDAA definition of "pattern" excludes acts that constitute a single "transaction" where the Model Legislation excludes acts constituting a single "event." The Model Legislation commentary states that "[t]wo separate offenses that occurred as part of a single transaction that amounted, in effect, to a single event would not fall within the statute, as it does under present federal law."²⁵⁴ This suggests that the RICO Cases Committee's concepts of "a single event" and "a single transaction" are closely related. Though these terms are not precisely equivalent, they have an identical function in the "pattern" definitions in which they appear: to focus on defendants engaged in repeated or continuous criminal activity. In commercial contexts, "transaction" may have a more definite meaning than the somewhat vague "event." It is therefore likely that "transaction" will encourage a more uniform application. In noncommercial contexts, such as "any act or threat involving murder," for example, "transaction" seems inappropriate.²⁵⁵ If, however, the two terms are combined with other essential language of the Model Legislation and NAAG/NDAA definitions, a reasonably useful definition of "pattern" emerges:

- (5) "Pattern of racketeering activity" means two or more acts . . . that are not isolated nor so closely related to each other that they constitute a single transaction or event.²⁵⁶

This definition contains the element of continuity of activity, because that element is implicit in the requirement of multiple transactions or events. The relationship between the acts is inherent in their relationship to the common perpetrator, the person being sued. RICO would thus be

253. Still another possible interpretation: that the phrase "not evincing continuity of activity" modifies "victim." Under this interpretation, any two acts would form a pattern unless they constitute a single transaction involving a single victim who is dead.

254. COMPREHENSIVE PERSPECTIVE, *supra* note 134, at 36.

255. *Black's Law Dictionary* offers the following definitions:

Event. The consequence of anything; the issue or outcome of an action as finally determined; that in which an action, operation, or series of operations, terminates.

BLACK'S LAW DICTIONARY 498 (5th ed. 1979).

Transaction. Act of transacting or conducting any business; negotiation; management; proceeding; that which is done; an affair. It may involve selling, leasing, borrowing, mortgaging or lending. Something which has taken place, whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered.

Id. at 1341.

256. The phrase "means two or more" is substituted for "requires at least two" for reasons discussed *supra* note 229.

limited to defendants who are engaged in repeated or ongoing criminal activity and who, presumably, are unlikely to be deterred by lesser sanctions.²⁵⁷

4. Fraud

It is widely conceded that the "commercial fraud"²⁵⁸ offenses are not the sort normally associated with organized crime or racketeering.²⁵⁹ In fact, they were not included in the early versions of RICO legislation. Fraud in the sale of securities was added in response to evidence that the Mafia was investing some of its vast funds in securities and engaging in stock manipulation and other prohibited practices.²⁶⁰ Mail and wire fraud were added at the same time, though it is not quite certain why.²⁶¹

Though the commercial fraud offenses were added as something of

257. A simple solution to the "pattern" problem appears in Arizona's little-RICO statute: Arizona has no "pattern" requirement at all. See ARIZ. REV. STAT. ANN. §§ 13-2301-17 (West 1978 & Supp. 1985). In fact, both the policies of deterring crime and of providing an adequate remedy for injured persons support Arizona's solution. Why should 1964(c)'s remedies be unavailable to a direct victim of racketeering activity?

258. The mail fraud and wire fraud statutes are as follows:

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (1982).

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

Id. § 1343.

259. This refers only to the common conception, which may or may not reflect reality. As the ABA Task Force puts it, "[s]ecurities, mail and wire fraud are not traditional criminal activities that one historically associates with the Mafia, La Cosa Nostra, or other organized criminal syndicates." ABA TASK FORCE REPORT, *supra* note 10, at 247. But see *infra* note 308.

260. ABA TASK FORCE REPORT, *supra* note 10, at 99 n.130.

261. *Id.*

an afterthought, they have been implicated in approximately ninety percent of the reported section 1964(c) cases, with the vast majority relying solely on those offenses.²⁶² In the words of Justice Marshall, "[t]he single most significant reason for the expansive use of civil RICO has been the presence in the statute, as predicate acts, of mail and wire fraud violations."²⁶³

The ABA Task Force acknowledged that elimination of the fraud predicate offenses from section 1961 would provide "a relatively uncomplicated solution to curbing Civil RICO's unwarranted overbreadth."²⁶⁴ Just on the basis of statistical analysis, this approach would reduce by ninety percent or more the claimed abuses of section 1964(c).²⁶⁵ On that basis, it would also eliminate ninety percent of the cases which are not perceived as abuses. Unlike the prior conviction and separate injury requirements, however, elimination or modification of the predicate acts least associated with the kinds of *defendants* RICO was expected to be used against and most associated with the declared abuses may have some analytical relationship to the desired result. It is not surprising, therefore, that separate bills incorporating versions of this solution are currently under consideration in the House and Senate.

H.R. 2517²⁶⁶ would introduce into RICO a so-called "fraud plus" requirement, amending section 1961(5) to read, in part:

(5) "pattern of criminal activity"²⁶⁷ means two or more acts of predicate criminal activity

. . . .

(B) all of which are not violations of the same provision of law, if that provision of law is—

(i) the second undesignated paragraph of sec-

262. *Id.* at 56. See *infra* note 272.

263. *Sedima*, 105 S. Ct. at 3293 (Marshall, J., dissenting).

264. ABA TASK FORCE REPORT, *supra* note 10, at 257. The Task Force discusses and rejects this approach. *Id.* at 247-64. Egan has suggested the elimination of the frauds as a basis for § 1964(c) suits. D. Egan, *Hearings on RICO*, *supra* note 102, at 3. Nathan recommended a prior conviction requirement for the fraud offenses only. I. Nathan, *Hearings on RICO*, *supra* note 89, at 6. This would virtually eliminate the frauds as a predicate act while introducing into RICO all the potential problems associated with a prior conviction requirement. See *supra* text accompanying note 184. Another means of eliminating the fraud predicate offenses, while appearing to preserve them, is the "fraud-plus" requirement that at least one predicate act be other than a fraud offense. For a discussion of the fraud-plus provisions in H.R. 2517 and S. 1521, see *infra* notes 265-72 and accompanying text.

265. 18 U.S.C. § 1964(c) (1982).

266. See *infra* Appendix B for complete text.

267. For a discussion of the substitution of "criminal" for "racketeering," see *infra* notes 302-11 and accompanying text.

tion 2314 (relating to the transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting) of this title;

(ii) section 1341 (relating to mail fraud) of this title; or

(iii) section 1342 [sic] (relating to wire fraud) of this title²⁶⁸

It may be appropriate to distinguish fraud offenses from others, since the general nature of the fraud offenses, which can include any misstatements transmitted by mail or telephone, is considered chiefly responsible for bringing the so-called ordinary business disputes into the federal court.²⁶⁹ Requiring a RICO claim to include at least one of the other predicate offenses may at least come closer than the other proposals we have examined to redirecting the RICO action without creating an arbitrary limitation. Congressman Conyers' bill, however, falls short of accomplishing this goal. Even ignoring the prior indictment requirement, the bill as written fails in its apparent purpose while producing a wholly arbitrary result. Since the bill would only prohibit actions based on violations of the same provision of law, it would not bar actions based on mail fraud *and* wire fraud, which are separate provisions of law. Actions based wholly on commercial frauds would remain subject to RICO provided at least one alleged false statement was made via the mails and one by telephone. Such disputes often include both, in which cases the measure would have no effect on use of the commercial frauds. Plaintiffs in other cases would be arbitrarily excluded because they could allege fraudulent representations transmitted by only one or the other means. Is fraud itself a less serious social concern, and therefore a less appropriate subject of RICO's drastic sanctions and remedies, than is the use of a single means of communication in its commission?

Moreover, the Conyers bill, by inserting the requirement in section 1961, would affect not only private citizens' access to section 1964(c) but also governmental access to the entire range of RICO's criminal and civil provisions. The United States Attorneys' guidelines for RICO prosecutions already prevent RICO prosecutions for conduct seen as involving nothing more than common law fraud.²⁷⁰ As noted earlier, claims of abuse of the racketeering statute which have accompanied the wide-

268. H.R. 2517, 99th Cong., 1st Sess. (1985). The correct citation for wire fraud is 18 U.S.C. § 1343 (1982). For complete text of H.R. 2517, see *infra* Appendix B.

269. See, e.g., *Sedima*, 105 S. Ct. at 3293 (Marshall, J., dissenting) and *supra* text accompanying note 263.

270. The United States Attorneys' Manual provides:

spread litigation under section 1964(c) by private plaintiffs have not accompanied the government's use of RICO's other provisions. Governmental use of RICO's criminal and civil provisions would be severely restricted by the new measure.

This result would be avoided by S. 1521, which would add a similar limitation directly to section 1964(c). Under S. 1521, section 1964(c) would contain the following provision:

(2) For purposes of this subsection, "pattern of racketeering activity" shall require that at least one act of racketeering activity shall be an act of racketeering activity other than—

- (i) an act indictable under section 1341 [mail fraud] of title 18, United States Code;
- (ii) an act indictable under section 1343 [wire fraud] of title 18, United States Code; or
- (iii) an act which is an offense involving fraud in the sale of securities.²⁷¹

In requiring that one act of racketeering activity be an act other than one of the "commercial fraud" offenses, this bill avoids the self defeating loophole in Representative Conyers' bill which would permit a RICO claim where different fraud offenses can be alleged. The provision in S. 1521 would probably accomplish its purpose of removing from civil RICO liability all of the cases described as "commercial disputes." In fact, though the "fraud plus" requirement is apparently conceived as a compromise between the extreme positions of eliminating the commercial fraud predicate offenses entirely and letting them stand unchanged, it leans heavily toward satisfying the former position, since it is the rare case in which fraud is alleged in conjunction with other offenses.²⁷²

9-110.330 *Charging RICO Counts*

A RICO count of an indictment will not be charged where the predicate acts consist solely and only of state offenses except in the following circumstances:

A. Cases where local law enforcement officials are unlikely to investigate and prosecute otherwise meritorious cases in which the Federal Government has significant interest;

B. Cases in which significant organized crime involvement exists; or

C. Cases in which the prosecution of significant political or governmental individuals may pose special problems for local prosecutors.

9-110.331 *Commentary*

The purpose of this guideline is to underscore the principle that prosecution of state crimes, except in the circumstances set forth above, is primarily the responsibility of the state authorities.

U.S. ATTORNEYS' MANUAL § 9-110.330-.331 (Mar. 9, 1984).

271. S. 1521, 99th Cong., 1st Sess. (1985). For complete text of S. 1521, see *infra* Appendix D.

272. According to the ABA Task Force:

Approximately 44 percent of the cases for which the predicate offenses can be deter-

Additionally, though direct amendment of 1964(c) avoids any limiting influence on the government's use of RICO's other provisions, it does not avoid limiting governmental use of section 1964(c) itself. In a case now pending, the Department of Justice is seeking to establish its authority to sue for treble damages under section 1964(c)²⁷³ and has requested that Congress write such authority into the statute itself.²⁷⁴ The Federal Deposit Insurance Corporation (FDIC) has already found section 1964(c) to be a useful tool. As the FDIC's Deputy General Counsel Daniel W. Persinger stated:

The experience of the recent past has shown that individuals are willing to engage in organized criminal activity involving banks which goes far beyond what has been viewed by the courts as "garden-variety fraud", "run-of-the-mill business disputes" or "ordinary commercial litigation". Rather, such illegal activity has been well organized and carried out on a sustained basis, resulting in serious harm to the target institution. When such a case arises, the FDIC has a substantial economic and legal interest in utilizing the benefits of the civil RICO statute to (1) deter similar activity, (2) recoup financial loss to the FDIC's insurance fund as well as to the bank's creditors and shareholders, and (3) establish important legal precedents to help proscribe future illegal activity.²⁷⁵

Stating that "[t]he vast majority of FDIC-insured commercial banks simply do not have the financial resources or the expertise to protect themselves from organized criminal activity and fraud,"²⁷⁶ Persinger suggested that Congress include 18 U.S.C. § 1344, bank fraud, among

mined from the opinion appear to rely solely on allegations of mail or wire fraud. Another 13 percent rely primarily on mail or wire fraud, but also alleged another predicate offense. Twelve percent focus on another predicate offense, but also alleged mail or wire fraud violations. Approximately 35 percent rely solely or primarily on allegations of securities fraud.

ABA TASK FORCE REPORT, *supra* note 10, at 57. It is not entirely clear whether securities fraud is considered as "another predicate offense" alleged in conjunction with mail or wire fraud for the purposes of the Task Force's analysis. Presumably, it is; otherwise, the cases documented would seem to add up to something approaching 104%, less some overlap. In that case, even some of the 13% described as alleging another predicate offense are based solely on commercial fraud. In any event, the "fraud plus" would probably have prevented more than half of the § 1964(c) actions from being filed.

273. 18 U.S.C. § 1964(c) (1982).

274. J. Keeney, *Hearings on RICO*, *supra* note 22, at 14.

275. D. Persinger, *Hearings on RICO*, *supra* note 137, at 6-7.

276. *Id.* at 10. According to Persinger, "[n]inety-seven percent of these banks have assets of less than \$500 million, eighty-four percent have assets of less than \$100 million and sixty-six percent have assets of less than \$50 million." *Id.* Persinger did not offer to explain how these figures reflect a lack of financial resources.

the predicate offenses.²⁷⁷

State²⁷⁸ and local governments have also been beneficiaries of sec-

277. *Id.* at 11-12. Title 18 U.S.C. § 1344 (1982), Bank fraud, provides in part:

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice—

- (1) to defraud a federally chartered or insured financial institution; or
- (2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than \$10,000, or imprisoned not more than five years, or both.

Persinger further stated:

While the Attorney General may bring a civil action to enjoin a violation of the bank fraud statute, just as in the case of mail or wire fraud, there is no provision in RICO denominating bank fraud a "predicate act", as there is in the case of mail or wire fraud. We believe bank fraud should be so denominated, thus allowing a private right of action for treble damages where such fraud amounts to a pattern of racketeering. Given the concern shown by Congress over the effect of bank fraud on the Nation's federally chartered and federally insured institutions, an amendment to RICO is a sensible extension of the intent to make bank fraud a federal crime.

D. Persinger, *Hearings on RICO*, *supra* note 137, at 11-12. The RICO Cases Committee reported that:

In the 1980-81 period, the failure of 105 banks and savings and loan associations cost \$1 billion. Roughly one half of the bank failures and one-quarter of the savings and loan failures had as a "major contributing factor" criminal activity by insiders. Failures that have occurred since are expected to add another \$1 billion to the total.

COMPREHENSIVE PERSPECTIVE, *supra* note 135, at 44-45 (citing Committee on Government Operations, *Federal Response to Criminal Misconduct and Insider Abuse in the Nation's Financial Institutions*, H.R. REP. No. 1137, 98th Cong., 2d Sess. 5 (1984)). H.R. REP. No. 1137 notes:

Despite such enormous losses, neither the banking nor the criminal justice systems impose effective sanctions or punishment to deter white-collar bank fraud. The few insiders who are singled out for civil sanctions by the banking agencies are usually either fined de minimis amounts or simply urged to resign. The few who are criminally prosecuted usually serve little, if any, time in prison for thefts that often cost millions of dollars.

Id. at 5, *quoted in* COMPREHENSIVE PERSPECTIVE, *supra* note 135, at 45 n.40.

Though the American Bankers Association has come out squarely in favor of measures that would limit the use of RICO's civil remedies, particularly with respect to the fraud offenses, it would seem that its members have much to gain from § 1964(c).

278. For example, Steven W. Hamm, Administrator, South Carolina Department of Consumer Affairs, testified:

The Department of Consumer Affairs, on behalf of the State of South Carolina and its citizens, is presently in federal court for the District of South Carolina as a plaintiff against, among others, a major second mortgage lender in a multi-million dollar lawsuit seeking to protect between 1200 and 2000 of my state's consumers. . . . Had we not had the RICO statute available to us, as it now exists, not only would we be powerless to recover financial losses for our consumers, our litigation would have been hopelessly and almost inextricably tied up in the bankruptcy court several states away. Such a result would make it almost impossible for the consumers involved, most of whom have serious financial problems, or are educationally disadvantaged, even to exert their claims.

....

Our case involves a secondary mortgage money lender who we contend took a "hit and run" approach to South Carolina and our citizens. People with bad credit

tion 1964(c). Indeed, fears that pre-*Sedima* judicial limitations of RICO's scope, contrived to meet the problems associated with private section 1964(c) actions, would limit local governments' successful use of RICO in confronting "the persistent challenges and dangers, as well as the corrupting influence, posed by systematic criminal frauds,"²⁷⁹ prompted the cities of New York, Chicago and Philadelphia to file *amicus* briefs to the Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.*²⁸⁰ and *American National Bank & Trust Co. v. Haroco, Inc.*²⁸¹ The cities stated that they

have found that the civil remedy provision in [RICO] is an effective weapon for deterring . . . various criminal schemes and protecting the public interest. . . . Specifically, the Cities have employed the civil remedy provision in RICO to attack fraudulent tax evasion, bribery and illegal bidding schemes In *City of New York v. Liberman*, the City of New York sued its former chief lease negotiator due to his participation in a scheme to defraud the City in connection with the City's leases of various properties In *City of New York v. Bandolene Fuels, Inc.*, New York sued a fuel oil company and its principal officer for the damages flowing from a fraudulent bidding and overbilling scheme In *City of Philadelphia v. Modern Transportation, Inc.*, the City of Philadelphia sued eleven cor-

problems were sought out by this company and loans were extended to them with unbelievably excessive "discount points," "origination fees," or interest rates. Disclosure was, to say the least, inadequate.

. . . .
We found consumers whose loans had been sold to more than one investor and consumers who could get no consistent payoff figure on their mortgage because no one knew the "real" terms of the loan. . . . In perhaps the most shocking scenario, we found consumers whose loan proceeds checks bounced, even though the mortgage for the loan was on their property and the defendant company sold or assigned the mortgage to an institutional investor knowing it had never made the proceeds checks good and, therefore, no loan even existed.

. . . .
The company in question was a well-greased tube—none of the assets "stuck" but were rather channeled to other pockets—either individual pockets or those of the 40 or 50 odd corporate alter egos of the defendant corporation. . . . Without RICO as it stands, [South Carolinian consumers] are virtually powerless to improve their lot—they need the ability to pursue legal action aggressively, effectively and quickly.

Hearings on RICO Before the Subcomm. on Criminal Justice of the House of Representatives Comm. on the Judiciary, 99th Cong., 1st Sess. (Oct. 29, 1985) (statement of Steven W. Hamm, Administrator of the S.C. Dep't of Consumer Affairs) (official government printing not yet available; cited from text of prepared statement, at 1-4).

279. Brief of *amicus curiae* for respondent, *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985) (available Sept. 19, 1985, on LEXIS, Genfed library, Briefs file).

280. 105 S. Ct. 3275 (1985).

281. 105 S. Ct. 3291 (1985).

porations due to their participation in an intricate scheme to defraud the City in connection with sludge removal contracts Civil RICO actions have also been employed by or on behalf of state or other local governments to recover the loss flowing from complex and farreaching frauds, often accompanied by bribery or some other form of corruption.²⁸²

The cities' presentation shows civil RICO functioning in a manner that might have been sanctioned even by the enacting Congress. Although the brief was directed at the particular issues addressed by the *Sedima* Court, the implications bear on any limitation that will deprive the cities of this remedy. The limitations on the fraud offenses proposed in S. 1521 would do just that.

The claims of abuse that have been directed toward the private use of section 1964(c) have not accompanied governmental use of the provision. It is doubtful whether the result of denying such use was intended, and even more doubtful whether such a result would be acceptable to Congress in the face of uncontroverted testimony that the provision has served or promises to serve as a valuable tool for governments at all levels.

This omission might easily be remedied by a special provision for governmental use of the commercial frauds, leaving the question of whether RICO is appropriately directed at *private* suits for fraud. Putting aside for the moment the question of "commercial disputes," it has been argued that section 1964(c) has seen significant duty, if not against the Mafia or La Cosa Nostra, at least against organized criminality in suits by private parties alleging fraud. Such legitimate uses of the statute should be preserved, reflecting, as they do, a successful accomplishment of the statute's purpose.

In an appearance before the Senate Judiciary Committee, Daniel H. Bookin urged the retention of the fraud offenses and the inclusion of credit card fraud as well.²⁸³ He recounted how VISA and MasterCard have successfully used section 1964(c) to fight credit card fraud schemes

282. Brief of *amicus curiae* for respondent, *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985) (available Sept. 19 1985, on LEXIS, Genfed library, Briefs file) (citing *City of Philadelphia v. Modern Trans., Inc.*, 85 Civ. 2052 (E.D. Pa. settled Feb. 13, 1985); *City of New York v. Bandolene Fuels, Inc.*, 81 Civ. 1240 (E.D.N.Y. filed Apr. 24, 1981); *City of New York v. Liberman*, Index no. 40339/85 (N.Y. Sup. Ct. filed Feb. 8, 1985)).

283. *Hearings on RICO Before the Subcomm. on Oversight of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (Sept. 24, 1985) (statement of Daniel H. Bookin, appearing on behalf of VISA and MasterCard) (official government printing not yet available; cited from text of prepared statement, at 2-11) [hereinafter cited as D. Bookin, *Hearings on RICO*].

involving millions of dollars and thousands of victims.²⁸⁴ He cited *VISA v. Drisang*²⁸⁵ to illustrate the importance of RICO in deterring such fraud:

[The defendants] tricked cardholders into disclosing their account numbers over the telephone by various methods, including statements or suggestions that defendants were somehow affiliated with MasterCard and VISA. . . . The defendant then manufactured and deposited VISA and MasterCard charge slips for transactions that never occurred, and the cardholder was billed for a charge that was never authorized.

. . . .

After the fraud was discovered, the defendants moved on to another bank, often using new corporate names, but following the same scheme. . . .

The defendants' fraudulent activities caused untold losses, inconvenience and emotional distress to more than 15,000 consumers around the country who either paid for charges they never authorized or were forced to go through the time-consuming efforts necessary to remove unauthorized charges from their accounts. . . .

. . . .

. . . The defendants used or attempted to use credit card merchant bank accounts in Hawaii, California, Wyoming, Utah, Georgia, Florida and Pennsylvania. At the time of our lawsuit, key witnesses and defendants were spread throughout the country. It was only through RICO and the resulting availability of the federal courts and nationwide service of process and subpoena power that we were able to bring an effective lawsuit. By its nature, RICO allows the bringing of a lawsuit that presents a full picture of a criminal enterprise, in contrast to a state court fraud action encompassing only a segment of the overall scheme.²⁸⁶

Cases such as *Drisang* seem to involve organized criminality appropriately brought within RICO's scope. Yet they probably fall within the classification of "fraud not related to securities or business transactions," which, according to the ABA Task Force, comprises but three percent of

284. *Id.*

285. No. 85-2627 PAR (C.D. Cal. filed Apr. 23, 1985), cited in D. Bookin, *Hearings on RICO*, *supra* note 283, at 6.

286. D. Bookin, *Hearings on RICO*, *supra* note 283, at 7-9 (citing *Drisang*).

the reported section 1964(c) decisions.²⁸⁷ Even if such uses of section 1964(c) are proper, they cannot justify a statute for which seventy-seven percent of such decisions involve "securities fraud [and] common law fraud in a commercial or business setting,"²⁸⁸ unless those uses, the vast majority of civil cases brought under the statute, are proper as well.

In addressing the question of whether business fraud is an appropriate subject for section 1964(c), the ABA Task Force took the position that it will take no position:

We did not, however, consider it our charge to determine whether policy considerations wholly apart from those considered by Congress in 1970—*e.g.*, the need to attack fraud in the national economy—justify a statute of Civil RICO's breadth. We believe that even if such alternative policy considerations would eventually yield a statute like Civil RICO, it is essential that Congress consider those matters before such a statute is allowed to stand as federal policy.²⁸⁹

The ABA Task Force "tried to view the policy considerations Congress addressed when the statute was passed."²⁹⁰ That has proved to be a futile task, considering the broad disagreement over what those policy considerations were, to say nothing of whether those policy considerations in fact embrace the uses to which section 1964(c) has been put.²⁹¹ In the words of Phillip A. Feigin, "the questions of what Congress meant and intended in 1970 should be secondary to considerations of what RICO should mean in 1985 and beyond."²⁹² Since virtually all use of section 1964(c) and all the attendant controversy involve the fraud offenses, "the need to attack fraud in the national economy" is precisely the matter that Congress is, in effect, considering as it ponders the future scope of the private civil remedy.

Among the matters which Congress has been invited to consider is the ineffectiveness of traditional remedies in confronting the not insignificant problem of fraud. Estimates of the direct economic cost of fraud in the national marketplace range from about \$80 billion to well over \$100 billion per year.²⁹³ This exceeds the \$70 billion to \$80 billion estimated

287. ABA TASK FORCE REPORT, *supra* note 10, at 55-56. See *supra* note 24.

288. *Id.*

289. ABA TASK FORCE REPORT, *supra* note 10, at 46 n.49 (emphasis in original).

290. *Id.* at 46.

291. See *supra* notes 5, 20 & 24.

292. P. Feigin, *Hearings on RICO*, *supra* note 137, at 5.

293. In 1974, the United States Chamber of Commerce analyzed the estimated costs of white-collar crime, in billions of dollars:

cost of antitrust violations,²⁹⁴ which long have been considered a suitable subject for precisely the remedies that section 1964(c) provides victims of RICO violations.²⁹⁵ And it may be that fraud produces additional costs not included in the estimates. In the words of Miriam S. Saxon:

Several white collar crime authorities . . . have noted that

Bankruptcy Fraud		\$ 0.08
Bribery, Kickbacks, and Payoffs		3.00
Computer-Related Crime		0.10
Consumer Fraud, Illegal Competition, Deceptive Practices (excluding price- fixing and industrial espionage)		21.00
Consumer victims:	\$ 5.5	
Business victims:	3.5	
Government revenue loss:	12.0	
Credit Card and Check Fraud		1.10
Credit Card:	0.1	
Check:	1.0	
Embezzlement and Pilferage		7.00
Embezzlement (cash, goods, services):	3.0	
Pilferage:	4.0	
Insurance Fraud		2.00
Insurer victims:	1.5	
Policyholder victims:	0.5	
Receiving Stolen Property		3.50
Securities Thefts and Frauds		4.00
TOTAL (billions) =		\$41.78

CHAMBER OF COMMERCE OF THE U.S. OF AM., A HANDBOOK ON WHITE COLLAR CRIME: EVERYONE'S PROBLEM, EVERYONE'S LOSS 6 (1974). The Chamber appeared before Congress in 1985 to testify that "the problem" with civil RICO "lies with the indiscriminate use of [mail fraud, wire fraud or securities fraud as predicate offenses] by private parties to further their self-interest." R. Middleton, *Hearings on RICO*, *supra* note 90, at 4.

The RICO Cases Committee estimates that, in view of the inflation rate, the forty billion dollar figure given by the Chamber of Commerce in 1974 could probably be doubled today. COMPREHENSIVE PERSPECTIVE, *supra* note 135, at 42. Moreover, the RICO Cases Committee pointed out that the Chamber's study "did not include those anti-trust violations that involve fraud; in 1968, antitrust violations generally were estimated to cost \$35 to 40 billion." *Id.* at 43 (citing SUBCOMM. ON CRIME, HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE 10 (Comm. Print 1978)). The RICO Cases Committee added that "[t]hat figure, too, could probably be doubled today." *Id.* at 43. Add to that the estimated \$2.5 to \$25 billion cost of fraud against the government each year. *Id.* (citing U.S. GEN. ACCOUNTING OFFICE, FEDERAL AGENCIES CAN, AND SHOULD, DO MORE TO COMBAT FRAUD IN GOVERNMENT PROGRAMS 7-12 (1978)).

There are indications that the Chamber of Commerce estimates may be conservative. The American Insurance Association estimates that fraudulent insurance claims may exceed \$11 billion per year. *Id.* at 44 (citing N.Y. Times, July 6, 1980, § —, at 17, col. 1). It will take more than inflation to account for the difference between that figure and the \$1.5 billion estimate in the 1974 Chamber study.

294. See *supra* note 293.

295. See *supra* note 41.

perhaps even more damaging than the monetary costs to society of white collar crimes are the broader social consequences of crimes and illegal actions committed by individuals of high social standing and responsibility. . . . It has been argued that . . . the American social and economic system is undermined when some of our political and economic leaders disregard the laws they advocate for others. Such violations may create cynicism and an attitude of "if others are doing it, I will too." . . . And although research in this area is limited, it has been argued that such destruction of faith in our legal system promotes an atmosphere of lawlessness, leading to more crime. It is further argued that deceptive and fraudulent practices by some businessmen may tend to force others to engage in similar practices in order to remain competitive, and thus the credibility of the commercial market is threatened.²⁹⁶

Accordingly, Herbert Edelhertz has observed:

White-collar crime, like common crime, can have a serious influence on the social fabric, and on the freedom of commercial and interpersonal transactions. Every stock market fraud lessens confidence in the securities market. Every commercial bribe or kickback debases the level of business competition, often forcing other suppliers to join in the practice if they are to survive.²⁹⁷

By recommending that the fraud offenses be included in state legislation, the RICO Cases Committee of the ABA Criminal Justice Section decided to rush in where the Section of Corporation, Banking and Business Law Task Force fears to tread.²⁹⁸ The RICO Cases Committee took the position that:

[F]raud is no minor matter to the people of the nation or to their businesses. It can hardly be argued that current law has curtailed it adequately. In short, if anything can be done to affect the incentive structure of commercial and other forms of criminal fraud, it would be to the advantage of all. New legal remedies must be developed that are, in an appropriate combi-

296. M. SAXON, CONGRESSIONAL RESEARCH SERV., REP. NO. 80-84 EPW, WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE 11-12 (1980).

297. H. EDELHERTZ, THE NATURE, IMPACT, AND PROSECUTION OF WHITE COLLAR CRIME 6-9 (1970), quoted in NAAG/NDAA, *Hearings on RICO*, *supra* note 104, at 42-43.

298. See *supra* text accompanying notes 289-92.

nation, swift, sure, and severe.²⁹⁹

RICO itself "promises that combination with its careful blend of public and private criminal and civil sanctions."³⁰⁰

Acknowledging that the criminal justice system lacks sufficient resources to combat crime effectively, Steven Twist stated that:

We must not take from the citizens their only effective resource for protection against fraud and racketeering and at the same time acknowledge our own inability to protect them. To do so would subject a predictably large number of Americans to victimization without remedy.³⁰¹

That virtually all the testimony advocating the effective repeal of section 1964(c) has been proffered by representatives of the very industries most frequently required to defend section 1964(c) suits predicated on fraud suggests either that fraud is so common a practice in those industries that any measure which threatens fraudfeasors threatens those industries themselves, or that the ease with which fraud can be alleged in any business dispute combined with the deep pocket of many members of those industries makes them ready victims of abuse of the statute. Those who accept the former alternative must weigh such testimony accordingly. Preferring the second alternative, however, leads one to conclude that all will benefit from a statute offering protection against victimization by fraud while providing sufficient protection against abuse of its provisions. For this reason, Congress must consider measures aimed at eliminating the abuse, not the remedy.

5. Additional measures to discourage abuse

In whatever form RICO emerges from the Ninety-ninth Congress, efforts to minimize abuse of the statute should be welcome. H.R. 2517's amendments of section 1962 seem directed to this end. The bill would amend section 1962 to read, in part:

(b) It shall be unlawful for any person who has received any

299. COMPREHENSIVE PERSPECTIVE, *supra* note 135, at 47 (citing R. POSNER, ECONOMIC ANALYSIS OF LAW § 7.2 (2d ed. 1977)).

300. *Id.* The Committee said further that "[t]he model legislation promises that combination." *Id.*

301. S. Twist, *Hearings on RICO*, *supra* note 122, at 20. As Twist concluded:

To retreat now from the full force of RICO would be an act of great irresponsibility, would signal a new era of uncontrolled fraud, and would break faith with the American people who have been promised and who deserve the best legal weapons available to fight racketeering and white collar crime and to preserve and protect our free market.

Id.

income . . . from a pattern of *criminal* activity . . . *knowingly* to use or invest . . . such income, in acquisition of any interest in . . . any enterprise

(c) It shall be unlawful for any person through a pattern of *criminal* activity . . . *knowingly* to acquire or maintain . . . any interest in or control of any enterprise

(d) It shall be unlawful for any person employed by or associated with any enterprise . . . *knowingly* to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of *criminal* activity³⁰²

The two changes in this section are the substitution of the word "criminal" for "racketeering" (a substitution that would be imposed throughout the statute) and the requirement that the conduct prohibited by section 1962 be "knowingly" violated.

The substitution of "criminal" for "racketeering" throughout the statute is an apparent response to the criticism that the "racketeer" label is a primary factor in inducing defendants to settle RICO claims whether or not the claims have merit.³⁰³ As noted, the ABA survey of attorneys with RICO experience not only failed to substantiate this claim but seemed to indicate that the "racketeer" charge in a civil suit causes defendants to become more intransigent.³⁰⁴ Either way, the "racketeer" label is unwelcome. A measure that discourages early settlement of a proper action is no more desirable than one that encourages a strike suit.

No strong policy considerations have been advanced for keeping the "racketeer" language.³⁰⁵ Attorney General Celebrezze of Ohio suggested

302. H.R. 2517, 99th Cong., 1st Sess. (1985) (emphasis added). For complete text of H.R. 2517, see *infra* Appendix B.

303. See *supra* notes 94-96 and accompanying text.

304. See *supra* text accompanying notes 145-46.

305. But the NAAG/NDAA argued that:

If the suggestion of those who would take "racketeering" out of RICO were carried to its logical conclusion, the Congress should also rename federally cognizable "murder," "rape," and "robbery" with less pejorative terms. These people have forgotten the proper role of social opprobrium in the administration of justice, criminal and civil. See, e.g., J. Feinberg, *Doing and Deserving* 98, 100-05, 115-16 (1970) ("At its best, in civilized and democratic countries, punishment surely expresses the community's strong *disapproval* of what the criminal did. Indeed, it can be said that punishment expresses the *judgment* (as distinct from any emotion) of the community that what the criminal did was wrong.") (emphasis in original); II J. Stephen, *A History of the Criminal Law of England* 81-82 (1883) ("[T]he sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. . . . In short, the infliction of punishment by law gives definite expression . . . to . . . the moral or popular . . . part of morality."). On the role of euphemisms in encouraging public and official reluctance to enforce the law and providing rationalizations for the violators themselves in the "white-collar crime" area, see *Task Force Report: Crime and Its Impact—An Assessment: Task Force on Assessment*, President's Commission

that "racketeering" appropriately defines the conduct of those who violate the statute.³⁰⁶ The Justice Department suggested that the term provides a useful shorthand that federal courts have become accustomed to, and that it would be difficult to find a less pejorative reference.³⁰⁷ They find "criminal" too general. The desire to have just the right word, however, does not outweigh the prejudicial consequences may result from the widely shared emotional reaction to the word "racketeer."³⁰⁸

The word usually offered as a substitute for "racketeer" is "criminal." "Criminal," in fact, appears in the Model Legislation³⁰⁹ as well as in H.R. 2517.³¹⁰ Those who object to being called "racketeers" seem content to be known as "criminals." Though the term "criminal" is a general one, it, too, appropriately defines the conduct of those who violate the statute. Though it would be a shame to sacrifice as inspired an acronym as "RICO,"³¹¹ better the acronym than the statute's substantive provisions.

The "knowingly" requirement, however, may have a very real effect on the burden of proof which must be borne in civil suits, as well as in criminal prosecutions. Dominic P. Gentile welcomed the additional burden, suggesting that in the absence of a scienter requirement in section 1962, the prohibitions of the section impose strict liability.³¹² Recognizing the element of intent inherent in the predicate acts, Gentile pointed

on Law Enforcement and Administration of Justice 104-08 (1967) ("Most white collar crime is not at all morally neutral"); D. Cressey, *Other People's Money* 102 (1952) (that embezzlers rationalize their conduct as different from theft is important factor in behavior pattern).

NAAG/NDAA, *Hearings on RICO*, *supra* note 104, at 11-12. But the NAAG/NDAA recognized that "Civil RICO is explicitly remedial, not penal." *Id.* at 60. No one disputes the suitability of the "racketeer" language to *criminal* RICO. The NAAG/NDAA argument seems less applicable to § 1964(c) with its appropriately lower burden of proof than to the criminal provisions of § 1963.

306. A. Celebrezze, *Hearings on RICO*, *supra* note 167, at 5.

307. J. Keeney, *Hearings on RICO*, *supra* note 22, at 41.

308. The NAAG/NDAA argued that "racketeer" is indeed the right word:

The dictionary . . . defines a "racket" as a "business run by fraud or extortion" and a "racketeer" as one who runs a "racket." *American Heritage Dictionary*, 580 (Dell. ed. 1970). If "legitimate" business people violate RICO's terms, they ought to be called "racketeers." No justification can be offered for limiting the term "racketeer"—or RICO—to those whose names end in vowels.

NAAG/NDAA, *Hearings on RICO*, *supra* note 104, at 10.

309. COMPREHENSIVE PERSPECTIVE, *supra* note 135, at 25-29.

310. See *infra* Appendix B for full text of H.R. 2517.

311. In the classic 1930 gangster movie, "Little Caesar," Edward G. Robinson played underworld czar Caesar Enrico Bandello, known as "Rico." G. Robert Blakey "will neither admit nor deny" that this had anything to do with the title of the statute. Blakey, *supra* note 5, at 237 n.3.

312. D. Gentile, *Hearings on RICO*, *supra* note 141, at 9.

out that "when the civil treble damage remedy is imposed it is not imposed for the [predicate act] itself but for the 'pattern of racketeering activity.'" ³¹³ He stated that strict liability "[i]n the context of the civil remedy . . . is abhorrent and contrary to the usual elements necessary to impose criminal liability for the predicate acts which are the foundation for the civil remedy. These traditional elements require both an evil mind ('knowingly') and an evil act." ³¹⁴ He concluded, therefore, that "the provision of 18 U.S.C. 1962(a), (b), and (c) should be modified so as to make it clear that the perpetrator of the [predicate act] must not only intend the [predicate act] itself, but also intend to be acting 'in a pattern'." ³¹⁵

The Justice Department argued that, as scienter is already required to be proved in connection with the commission of the predicate acts, the additional scienter requirement is unnecessary and would only confuse juries in already complex cases. ³¹⁶ Indeed, by imposing the additional element to be proved, the measure would permit defendants to escape conviction in cases where commission of the predicate acts and infiltration were proved. The benefit obtained by the additional element may well be outweighed by the additional burden this would impose on prosecutors who must already prove intent to commit the underlying offenses beyond a reasonable doubt.

Civil plaintiffs, however, are subject to neither the self-imposed restraint which guides the Justice Department nor the reasonable doubt standard that all but assures that a convicted criminal defendant committed predicate offenses that rise to the level of criminal conduct. ³¹⁷ Additional protection for a civil defendant might be secured by inserting the scienter requirement directly into section 1964(c) instead of into section 1962 where it appears in Representative Conyers' bill, H.R. 2517. ³¹⁸ This would produce the unusual result of demanding a greater burden of proof in civil suits than in criminal prosecutions, an effect that would be felt in section 1964(c) suits instituted by the Justice Department, already presumably guided by the same principles of "prosecutorial restraint" applied in criminal prosecutions. ³¹⁹

Perhaps the result aimed at by the Conyers measure might be

313. *Id.*

314. *Id.*

315. *Id.*

316. J. Keeney, *Hearings on RICO*, *supra* note 22, at 50.

317. For the guidelines for RICO prosecutions in the *United States Attorneys' Manual*, see *supra* note 270.

318. See *infra* Appendix B for full text of H.R. 2517.

319. U.S. ATTORNEYS' MANUAL § 9-110.330-331 (Mar. 9, 1984).

achieved indirectly by a proposal made before Congress by Donald E. Egan, who viewed the vagueness of section 1962(c)'s terms as a particular source of abuse.³²⁰ As Egan observed, a violation of section 1962(c), unlike a violation of sections 1962(a) and 1962(b),³²¹ requires that the enterprise's affairs be conducted through the underlying predicate offenses.³²² He expressed concern that, contrary to the apparent sense of section 1962(c), civil claims based on that subsection "are being filed where the alleged acts of racketeering are merely incidental to the enterprise."³²³ Consequently, he recommended that section 1962(c) be amended to read:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to "*manage*" or *knowingly* participate, directly or indirectly, in the "*management*" of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.³²⁴

As Egan explained, the provision would not immunize non-managerial persons from RICO liability: "If the nonmanagerial person knowingly participates in the racketeering activities which are the means by which the enterprise is being managed, he would be liable."³²⁵ At the same time, the change would narrow the focus of RICO on enterprise crime by removing unauthorized actions of low level employees from its scope.

Indeed, one of the principle sources of perceived abuse of section 1964(c) is the vicarious liability of the employer under RICO's treble damages provision for the unauthorized acts of an employee.³²⁶ In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*,³²⁷ a treble damages action under the antitrust laws, the Supreme Court followed the "general rule" in holding that an employer is liable for the acts of an employee where the employee acts with "apparent authority," though the acts complained of were unauthorized and performed solely to benefit the employee himself.³²⁸ This rule has not been universally

320. D. Egan, *Hearings on RICO*, *supra* note 102, at 17-18.

321. See *infra* Appendix A for complete text of § 1962(a)-(b).

322. D. Egan, *Hearings on RICO*, *supra* note 102, at 17-18.

323. *Id.* at 18.

324. *Id.* at 19 (emphasis in original).

325. *Id.*

326. ABA TASK FORCE REPORT, *supra* note 10, at 342. Cases holding for such liability include: *Aliberti v. E.F. Hutton*, 591 F. Supp. 632 (D. Mass. 1984); *Bernstein v. IDT Corp.*, 582 F. Supp. 1079 (D. Del. 1984); *Lopez v. Dean Witter Reynolds, Inc.*, 591 F. Supp. 581 (N.D. Cal. 1984); *Harper v. New Japan Sec. Int'l, Inc.*, 545 F. Supp. 1002 (C.D. Cal. 1982).

327. 456 U.S. 556 (1982).

328. *Id.* at 577.

applied in 1964(c) cases, and the ABA Task Force expressed the view that "the key issue of derivative liability should not be left to haphazard judicial development."³²⁹ The Task Force further stated that:

[T]reble damages under Civil RICO should not be triggered pursuant to the same federal civil *respondeat superior* test. The Task Force does not believe, for example, that a brokerage firm should have treble damage Civil RICO liability for the pattern of racketeering activity of low level agents or employees in cases where there is no direct criminal involvement of either high-level managerial agents or top officers or directors and where there has been no conscious avoidance or wilfull blindness of offending activities by such high-level officials or managerial agents. Indeed, these are the very circumstances where the corporate entity, while probably having single damage *respondeat superior* liability under the federal securities laws to the victims of the predicate offenses committed by its low-level employees or agents, should, as a RICO victim, have standing to pursue a treble damage private Civil RICO cause of action against its errant low-level employees and agents.³³⁰

Accordingly, the ABA Task Force recommended that section 1964(c) be amended to include a provision similar to section 2.07(1)(c)(3) of the Model Penal Code, which limits the criminal liability of corporations and unincorporated associations for the unauthorized conduct of employees to situations where "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."³³¹

The ABA Task Force recommended, however, that "recklessly tolerated" be changed to "knowingly tolerated."³³² As the Task Force explained it:

[T]he trend in modern federal criminal law decisions has been to interpret "knowing" or "knowingly" to include reckless conduct only if the circumstances demonstrate "conscious avoidance" or "wilful blindness" of the existence of the violative conduct. The Task Force's preference for the word "knowingly" in lieu of "recklessly" is intended to embrace the concepts of "conscious avoidance" and "wilful blindness."

329. ABA TASK FORCE REPORT, *supra* note 10, at 360.

330. *Id.* at 360-61.

331. MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1972).

332. ABA TASK FORCE REPORT, *supra* note 10, at 362.

However, it is intended to avoid covering borderline cases of ordinary negligence, that might be pursued by plaintiff's pursuant to the "recklessly tolerated" language.³³³

The ABA Task Force did not adequately explain its determination that an appropriate standard of vicarious liability for section 1964(c) be drawn from "modern federal *criminal* law decisions." Though such decisions may provide the proper standard for section 1963, treble damages and attorneys' fees alone do not convert section 1964(c)'s civil remedy into a criminal penalty warranting the protections of the criminal law. In fact, the standard recommended for civil liability under section 1964(c) is more stringent than that which the Model Penal Code provides for criminal liability.

The ABA Task Force found "Congressional support for limiting the treble damage liability of corporations and other entities on a *respondeat superior* or other derivative liability basis" in the Insider Trading Sanctions Act of 1984 (ITSA).³³⁴ Section 2 of the ITSA provides for "a civil penalty" of up to "three times the profit gained or loss avoided as a result of . . . unlawful purchase or sale," to be paid into the United States Treasury by any person or aider and abettor of any person found to have violated its provisions.³³⁵ Section 2 further provides in part that:

No person shall be subject to a sanction under subparagraph (A) of this paragraph solely because that person aided and abetted a transaction covered by such subparagraph in a manner other than by communicating material nonpublic information. . . . No person shall be liable under this paragraph solely by reason of employing another person who is liable under this paragraph.³³⁶

This provision is not a "treble damage" provision; it is a penalty provision. As such, it is more closely related to criminal sanctions than to section 1964(c)'s civil remedy. If anything, it evinces congressional recognition of the inadequacy of merely disgorging a wrongdoer of ill-gotten gains as a means of deterring wrongful conduct. If the ABA Task Force is seeking an apt analogy, it is to be found in the antitrust laws.³³⁷

The ABA Task Force recognized that:

Even assuming the infiltrated business is as innocent as the vic-

333. *Id.*

334. *Id.* at 356 (citing ITSA, Pub. L. No. 98-376, 98 Stat. 1264 (1984) (codified at 15 U.S.C.A. § 78u (West Supp. 1985))).

335. 15 U.S.C.A. § 78u(d)(2)(A) (West Supp. 1985).

336. *Id.* § 78u(d)(2)(B).

337. *See supra* text accompanying notes 327-28.

tim of the RICO violation, it would seem better to place the risk of loss peculiarly attributable to the RICO violation on the infiltrated business entity rather than the victim, for the entity is in a position to adopt policies or practices to lessen the likelihood of RICO violations, and to spread the loss incurred over a larger group.³³⁸

Insofar as the vicarious liability provision proposed by the ABA Task Force as well as the "management" amendment suggested by Egan would insulate the employer from treble damages liability, they would virtually annihilate any incentive for such defendants actively to discourage employees from engaging in the conduct RICO seeks to deter. An employer often benefits from such conduct and, in fact, facilitates it. Since the employer is in the best position to discourage the conduct, it ought to have a greater burden to do so than would be imposed under these formulations.

If immunity from *respondeat superior* is viewed as undesirable but treble damage strict liability imposes too severe a burden, Congress might consider adopting into section 1964(c) a suitable modification of the language it used in the ITSA. Such a modification of section 1964(c) might be read as follows:

No person shall be liable under this section for more than actual damages solely by reason of employing another person who is liable under this section.

This provision contemplates a fault standard for treble damage liability. It would provide adequate protection for innocent employers while imposing on them at the least a duty of reasonable care to protect others from the unlawful conduct of those in their employ.

S. 1521 addresses the problem of abuse of RICO by private plaintiffs by adding to section 1964(c) the following provision:

(3) If the court determines that a suit brought under this subsection was frivolous and without merit, the court may, at its discretion, award the cost of the suit including reasonable attorney's fees to the defendant.³³⁹

Although it has been suggested that there is scant empirical evidence that RICO has been more abused than any other cause of action,³⁴⁰ that is hardly a settled question. Certainly, to the extent that the statute does invite abuse, a provision which would discourage such abuse

338. ABA TASK FORCE REPORT, *supra* note 10, at 363-64.

339. S. 1521, 99th Cong., 1st Sess. (1985). For complete text see *infra* Appendix D.

340. See *supra* text accompanying notes 150-51.

would be welcome. The problem with the S. 1521 solution, however, is that it adds very little to what is already there. Any suits which would be discouraged by the unlikely imposition of sanctions contained in S. 1521 would probably be discouraged by the sanctions already imposed under Rule 11 of the Federal Rules of Civil Procedure.³⁴¹ Rule 11 provides for sanctions, including costs and attorney's fees, to be awarded against a party and attorney where the attorney files a pleading that fails to meet the requirements that "to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose."³⁴²

The sanctions authorized by Rule 11 already are being invoked in instances where section 1964(c) claims were found to have been filed in violation of Rule 11.³⁴³ It is difficult to see what, if anything, is added by the S. 1521 amendment. As a matter of fact, its provisions are substantively identical to Rule 11.

Irvin B. Nathan has proposed that Congress consider a measure that would impose some "multiple of costs and attorneys' fees, against any party found to have brought a meritless RICO action."³⁴⁴ Unlike S. 1521, such a provision would exceed the sanctions now provided for in

341. FED. R. CIV. P. 11.

342. *Id.*

343. *See, e.g.,* Lepucki v. Van Wormer, 765 F.2d 86 (7th Cir.), *cert. denied*, 106 S. Ct. 86 (1985). Egan suggested that the proposed provision might, in fact, have an effect opposite to that which it is designed to achieve: "The proposed provision to civil RICO adds nothing that Rule 11 does not presently provide and, indeed, because [of] its use of such ambiguous terms as 'frivolous' and 'without merit,' may allow for inroads on the very exacting standard to which Rule 11 presently holds attorneys." D. Egan, *Hearings on RICO*, *supra* note 102, at 25.

344. I. Nathan, *Hearings on RICO*, *supra* note 89, at 32. Nathan offered several alternative solutions to the meritless suit problem, if indeed it is a problem. He suggested:

One approach would be to require that treble-damage actions be brought by federal or state officials in *parens patriae* suits. Such *parens patriae* actions would permit recovery for persons with meritorious civil claims. Inappropriate RICO claims would be foreclosed by a screening device analogous to prosecutorial discretion.

Id. at 29-30. Under this approach, a victim's opportunity for his day in court would depend less on whether his suit had merit than on whether it afforded the most valuable use of the Justice Department's, or Attorney General's, already limited resources.

Nathan also suggested, in the alternative, that RICO be amended to require a preliminary hearing in private § 1964(c) actions. As he described it:

This hearing would take place early in the proceedings, before pre-trial discovery had been undertaken. At this hearing, a plaintiff would have to satisfy a two-prong test: first, that there was a reasonable factual basis to believe that plaintiff would be able to prove at trial each element of the RICO offense charged; and second, that such a RICO violation, if proved, would be of the type that merited criminal prosecution under Justice Department standards.

Id. at 30. The Justice Department standards, however, are designed in part to make best use of

Rule 11. Singling RICO out for such enhanced sanctions might be an appropriate response to a congressional finding that section 1964(c) is indeed a particular source of meritless suits undeterred by the already existing sanctions. In making such a determination, of course, Congress must distinguish suits which have no merit from legitimate causes of action arising out of circumstances which may have been unanticipated in 1970.

VI. SUMMARY OF ANALYSIS

As Congress considers the future of civil RICO, it should keep in mind that only a handful of treble damage awards have been realized under the statute.³⁴⁵ Before rushing to introduce changes that may effectively eliminate the private attorney general concept from section 1964(c)³⁴⁶—as, for example, prior conviction or “fraud plus” requirements would do³⁴⁷—it might be wise to wait and see whether, in the

their limited resources, and do not embody a definition of the law of RICO. *See supra* note 270 and accompanying text.

Arizona's little-RICO statute includes the following in its civil remedy provisions:

K. A person other than the attorney general or county attorney who files an action under this section shall serve notice and one copy of the pleading on the attorney general within thirty days after the action is filed with the superior court. . . .

L. Except in cases filed by a county attorney, the attorney general may, upon timely application, intervene in any civil action or proceeding brought under this section if the attorney general certifies that in his opinion the action is of special public importance.

M. In addition to the state's right to intervene as a party in any action under this section, the attorney general may appear as *amicus curiae* in any proceeding in which a claim under this section has been asserted.

ARIZ. REV. STAT. ANN. § 13-2314 (West Supp. 1985). As Twist described this measure:

In 1982 our legislature required all private RICO plaintiffs to send a copy of their complaint to the Attorney General. It also empowered the Attorney General to intervene in any RICO case or to file *amicus* briefs. As a result, our office has a fairly complete file of all private civil RICO cases in Arizona. We do not have to rely on the hyperbole of litigators to evaluate the uses made of RICO and the potential for abuse. We have filed *amicus* briefs on behalf of both plaintiffs and defendants. We have even defended (successfully) a RICO action.

S. Twist, *Hearings on RICO*, *supra* note 122, at 12-13. Some formulation of Arizona's practice might be workable for federal RICO. It would still permit plaintiffs with legitimate claims to prosecute their suits. At the same time, it introduces an element of “prosecutorial discretion,” presumably without making undue demand on the Attorney General's limited resources. Additionally, the practice would have the beneficial side-effect of providing a means of accumulating exhaustive data so that, a few more years down the road, Congress can take a good look at how § 1964(c) is, in fact, being used without having to rely, as Twist aptly puts it, on the hyperbole of litigators.

345. *See supra* note 35 and accompanying text.

346. 18 U.S.C. § 1964(c) (1982). For a discussion of the private attorney general concept, see *supra* note 19 and accompanying text.

347. For a discussion of the proposed prior conviction requirement, see *supra* notes 174-91

wake of *Sedima, S.P.R.L. v. Imrex Co.*,³⁴⁸ the horrors envisioned by RICO's critics in fact materialize.

While RICO's propensity for abuse is largely speculative, its value in some contexts is well documented. The private civil remedy, conceived as a weapon against the infiltration by organized crime into legitimate businesses, appears to have emerged primarily as a weapon against fraud committed by wholly illegitimate enterprises as well as by otherwise legitimate ones.³⁴⁹ Though the statute has functioned in an area different from that anticipated by its enactors, it is an area of no less importance to the victims of fraud and to the country.

On the other hand, there are some areas of confusion that Congress could clarify now without limiting the effectiveness of the statute where it *is* effective. Most notable is the definition of "pattern." In suggesting the direction that such a definition should take, the *Sedima* Court focused on the elements of "continuity plus relationship."³⁵⁰ Subsequent courts have not applied these principles uniformly.³⁵¹ Congress should take this opportunity to formulate a definition that would confine the statute's scope to ongoing criminal activity. A requirement of multiple transactions or events should be part of such a definition.³⁵² At the same time, Congress should be especially careful of adopting judicial definitions suited to the facts of particular cases but inappropriate to the statute as a whole.³⁵³

Finally, Congress ought to consider the goals that are furthered by leaving to the various courts the determination of whether vicarious liability for treble damages attaches under the statute. To provide employers some protection from vicarious treble damages liability resulting from employee misconduct reasonably beyond the employers' control may be justified. The goals to be achieved under the treble damages remedy, both of deterring unlawful conduct by making it unprofitable and of providing *adequate* remedies to the victims of such conduct,³⁵⁴ seem misdirected when the cost is to be borne by persons or enterprises not reasonably responsible for the offending conduct. The key concept is *re-*

and accompanying text; for a discussion of "fraud plus," see *supra* notes 266-72 and accompanying text.

348. 105 S. Ct. 3275 (1985).

349. For a discussion of the 91st Congress' original conception of RICO, see *supra* note 5; for statistical analyses of civil RICO's subsequent use, see *supra* notes 22-28 and accompanying text.

350. 105 S. Ct. at 3285 n.14; see *supra* notes 222-24 and accompanying text.

351. See *supra* note 227.

352. See *supra* notes 229-57 and accompanying text.

353. See *supra* notes 228-41 and accompanying text.

354. See *supra* notes 116-23 and accompanying text.

sponsibility, and Congress should not carry the principle of immunity from vicarious liability so far as to eliminate an employer's incentive to prevent employee misconduct that *can* be prevented. However, any formulation directed to limiting vicarious liability should limit liability for *treble damages only*, so that the liability of the employee and employer can be determined in a single suit.

VII. CONCLUSION

Though it might be conceded that RICO's private right of action has been something less than a lethal weapon in the war against organized crime, the measure may prove a hero in the war against fraud. Fraud is a growing problem that is not likely to disappear by itself. Civil RICO provides a partial solution. It would be a great mistake for Congress to adopt amendments that would limit the effectiveness of the treble damages provision where it is proving effective.

At the same time, the judicial debate over some issues that have arisen under the statute has survived *Sedima*. These issues need to be decided by the Ninety-ninth Congress. Particularly, a definition of "pattern" should be formulated that will confine the statute's scope to ongoing criminal activity. And innocent parties should be provided some protection from vicarious liability for treble damages.

Although changes directed to these issues would provide but a minor answer to what many consider a major question, the benefits already provided by the statute argue strongly against a more extensive revision at this time. When and if abuses that are now feared become documented facts, Congress will be in a better position to address such abuses with specific measures directed to that purpose.

Bruce Haber

APPENDIX A

The following includes all portions of the RICO statute, 18 U.S.C. §§ 1961-1968 (1982), 18 U.S.C.A. §§ 1961(1), 1963, 1964(b) (West Supp. 1985), relevant to the private/civil right of action:

§ 1961. Definitions

As used in this chapter—

(1) “[r]acketeering activity” means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-2424 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the feloni-

ous manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

....

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the

establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or [sic] racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

....

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under

this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of actions

.....

§ 1967. Evidence

.....

§ 1968. Civil investigative demand

.....

APPENDIX B

H.R. 2517, 99th Cong., 1st Sess. (1985), sponsored by Representative John C. Conyers, Jr. (Democrat, 1st dist., Mich.), reads in full:

To amend chapter 96 of title 18, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DEFINITIONAL AMENDMENTS.

Section 1961 of title 18, United States Code, is amended—

(1) in paragraph (1), by striking out “racketeering” and inserting “predicate criminal” in lieu thereof;

(2) so that paragraph (4) reads as follows:

“(4) ‘enterprise’ means a business or other similar business-like undertaking by an association of persons, whether organized for legitimate or illegitimate purposes, and includes a government or government agency;”;

(3) so that paragraph (5) reads as follows:

“(5) ‘pattern of criminal activity’ means two or more acts of predicate criminal activity, separate in time and place—

“(A) each of which occurred not more than five years before the indictment is found, or information is instituted, that names such acts as predicate criminal activity;

“(B) all of which are not violations of the same provision of law, if that provision of law is—

“(i) the second undesignated paragraph of section 2314 (relating to the transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting) of this title;

“(ii) section 1341 (relating to mail fraud) of this title; or

“(iii) section 1342 [sic]* (relating to wire fraud) of this title; and

“(C) that are interrelated by a common scheme, plan, or motive, and are not isolated events;”;

(4) by striking out “and” at the end of paragraph (9);

(5) by striking out the period at the end of paragraph

* The correct citation for wire fraud is 18 U.S.C. § 1343 (1982).

(10) and inserting “; and” in lieu thereof; and

(6) by adding at the end the following:

“(11) ‘criminal syndicate’ means an enterprise of five or more persons, a significant purpose of which is to engage on a continuing basis in a pattern of criminal activity, other than a pattern of criminal activity consisting solely of conduct constituting a felony under section 1084 of this title or under the law of a State relating to engaging in a gambling business.”.

SEC. 2. OFFENSE AMENDMENTS.

Section 1962 of title 18, United States Code, is amended—

(1) by inserting after the heading of such section the following new subsection:

“(a) It shall be unlawful for any person knowingly to organize, own, control, finance, or otherwise participate in a supervisory capacity in a criminal syndicate.”;

(2) by redesignating subsections (a), (b), and (c) as subsections (b), (c), and (d), respectively;

(3) in the subsection redesignated as subsection (b) by paragraph (2)—

(A) by striking out “racketeering activity” each place it appears and inserting “criminal activity” in lieu thereof; and

(B) by inserting “knowingly” before “to use or invest”;

(4) in the subsection redesignated as subsection (c) by paragraph (2)—

(A) by striking out “racketeering activity” and inserting “criminal activity” in lieu thereof; and

(B) by inserting “knowingly” before “to acquire or maintain”;

(5) in the subsection redesignated as subsection (d) by paragraph (2)—

(A) by striking out “racketeering activity” and inserting “criminal activity” in lieu thereof; and

(B) by inserting “knowingly” before “to conduct or participate”; and

(6) by striking out the subsection designated (d) without regard to the redesignations made by paragraph (2).

SEC. 3. SECTION 1963 AMENDMENTS.

Section 1963(a) of title 18, United States Code, is amended—

(1) by striking out “any provision of section 1962 of this chapter” and inserting “section 1962” in lieu thereof;

(2) by inserting “in the case of a violation of a subsection other than subsection (a) of such section” after “shall” the first place it appears; and

(3) by inserting “and in the case of a violation of subsection (a) of such section be fined not more than \$250,000 or imprisoned not more than 30 years, or both,” after “or both,”.

SEC. 4. CLERICAL AMENDMENTS.

(a) **HEADING FOR CHAPTER.**—The heading of chapter 96 of title 18, United States Code, is amended by striking out “**RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS**” and inserting “**CRIMINAL ENTERPRISES AND CORRUPTION OF ENTERPRISES**” in lieu thereof.

(b) **TABLE OF CHAPTERS.**—The table of chapters at the beginning of part I of title 18, United States Code, is amended so that the item relating to chapter 96 is amended to read as follows:

“96. Criminal enterprises and corruption of enterprises. . . . 1961”.

APPENDIX C

H.R. 2943, 99th Cong., 1st Sess. (1985), sponsored by Representative Fredrick C. Boucher (Democrat, 9th dist., Va.), reads in full: To amend section 1964 of title 18, United States Code, with respect to certain civil remedies for persons injured by racketeering activity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1964(c) of title 18, United States Code, is amended—

(1) by striking out “a violation” and inserting “conduct in violation” in lieu thereof;

(2) by striking out “therefor” and inserting “any person who engaged in that conduct and, with respect to such conduct, was convicted of racketeering activity or of a violation of section 1962” in lieu thereof;

(3) by inserting a comma after “district court”; and

(4) by adding at the end the following: “A civil action under this subsection may not be commenced against a defendant later than one year after the entry of the latest judgment of conviction against the defendant for racketeering activity or a violation of section 1962 with respect to the conduct out of which such action arises.”.

APPENDIX D

S. 1521, 99th Cong., 1st Sess. (1985), sponsored by Sen. Orrin G. Hatch (Republican, Utah), reads in full:

To clarify the intent of the Racketeer Influenced and Corrupt Organizations Act with respect to private civil actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:

“(c)(1) Any person suffering competitive, investment, or other business injury as a result of a violation of section 1962 of this chapter involving a pattern of racketeering activity may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney’s fees.

“(2) For purposes of this subsection, ‘pattern of racketeering activity’ shall require that at least one act of racketeering activity shall be an act of racketeering activity other than—

“(i) an act indictable under section 1341 of title 18, United States Code;

“(ii) an act indictable under section 1343 of title 18, United States Code; or

“(iii) an act which is an offense involving fraud in the sale of securities.

“(3) If the court determines that a suit brought under this subsection was frivolous and without merit, the court may, at its discretion, award the cost of the suit including reasonable attorney’s fees to the defendant.”.